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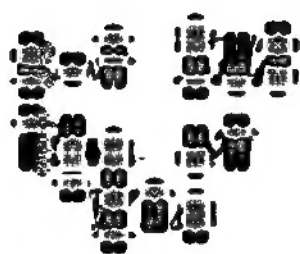
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Bombay High Court Reports.

VOLUME VIII.

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF BOMBAY.

1871.

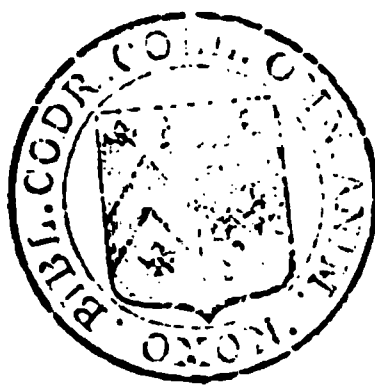
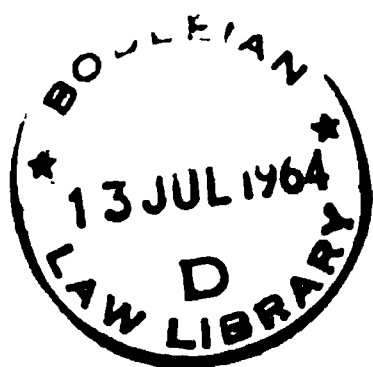
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1872.



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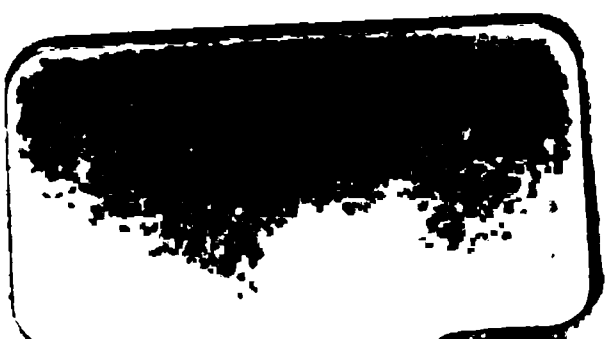
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ERRATA, CORRIGENDA, ET ADDENDA.

Page.

- 53 O.C.J. Line 6 from top of page, *for* "estbalished" *read* "established."
- 58 „ Line 12 „ bottom „ *for* "Lamensâ" *read* "a mensâ."
- 73 „ Line 8 „ „ „ *for* "when" *read* "where."
- 86 „ Line 17 „ top „ *for* "coomletely" *read* "completely."
- 87 „ Line 12 „ „ „ *for* "April" *read* "March."
- 118 „ Line 11 „ bottom „ *for* "the" *read* "this."
- 123 „ Line 10 „ top „ *for* "uuder" *read* "under."
- 133 „ Line 13 „ bottom „ *for* "in about 1864" *read* "in or about 1864."
- 139 „ Line 5 „ top „ *dele* "not."
- 143 „ Line 26 „ „ „ *for* "from that in Bankruptcy" *read* "and that in Bankruptcy."
- 152 „ Line 2 „ „ „ *for* "counsil" *read* "counsel."
- 156 „ Line 5 „ „ „ *dele* comma after "least."
- 171 „ In note, Line 6 from top, *for* "Messrs. Ewart, Latham, & Co." *read* "Messrs. Forbes & Co."
- 177 „ Line 3 from top of page, *for* "jndgment" *read* "judgment."
- 186 „ Line 9 „ bottom „ *dele* comma at end of line.
- 187 „ Line 13 „ top „ *after* "enjoyment of a man" *insert* "or."
- 223 „ Line 15 „ bottom „ *for* "ctied" *read* "cited."
- 232 „ Line 5 „ top „ *for* "continuenso" *read* "continue so."
- 255 „ Line 16 „ „ „ *for* "occurss" *read* "occurs."
- 93 A.C.J. Last line, *for* "roposition" *read* "proposition."
- 159 „ „ *for* "on" *read* "no."
- 12 CR. CA. In first line of head-note, *omit* "7th explanatory note and."
- 15 „ Line 17 from bottom of page, *for* "Act XVII. of 1852" *read* "Act XVII. of 1862."
- 21 „ In first line of head-note, *for* "judicicial" *read* "judicial."
- 63 „ In 12th line of head-note, *for* "12 & 13 Vict., c. 69, ss. 2 & 3," *read* "12 & 13 Vict., c. 96, ss. 2 & 3."
- 75 „ Line 9 from bottom of page, *for* "the considerations" *read* "these considerations."
- 103 „ Line 25 from bottom of page, *for* "own" *read* "upon," and *for* "on" *read* "own."

CASES

DECIDED IN THE

ORIGINAL CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

1871. 134. —————

Appeal Suit No. 169.

1871.
March 2.

DA'MODHAR MA'DHAVJI *Appellant.*
KAHA'NDA'S NA'RANDA'S *Respondent.*

Champerty—Maintenance—Public Policy—Void Agreement—Practice—Parties.

One M. H., being apprehensive that (in consequence of an action of trespass in the Supreme Court which M. R. and A. R. had brought against P. P.) he was in danger of being deprived of a piece of land of which he was then possessed, entered into an agreement with K. N. that he, K. N., should conduct the pending case at his own costs and necessary expenses, and that after M. H. should have proved that the piece of land was his sole property, K. N. and M. H. should erect a building on it at their joint expense, and that the rents and profits of such building should be enjoyed by K. N. and M. H. jointly during the lifetime of M. H., after whose death the property, with the building, was to be the sole and absolute property of K. N.

Held that the above agreement (when considered in connection with its surrounding circumstances) did not savour of maintenance or champerty, nor was it void as being against public policy.

The question as to how far the English law relating to maintenance and champerty is applicable to Hindús in the Presidency towns considered.

Quere whether that law was ever applicable to cases where pecuniary assistance is afforded to defendants.

Where K. N., claiming under the above agreement, sued to recover the property comprised in it from the mortgagee of the administrator of M. H., who was in possession of the property, it was held that the representatives of the mortgagor were not necessary parties to the suit.

THIS was an appeal from the judgment of BAYLEY, J., delivered on the 13th of August 1870.

1871.
DA' MODHAR
MA'DHAVJI
v.
KAHA'NDA'S
NA'RANDA'S.

The plaintiff, under an agreement dated the 13th of September 1849, sued to recover from the defendants, six in number, the property therein described. The agreement ran as follows :—

“ Know all men by these presents that I the undersigned, Munilál Harjivandás, Baniá, a Hindú inhabitant of Bombay, do hereby agree unto Sutár Kahándás Nárandás, also a Hindú inhabitant of Bombay, in the manner following, that is to say, that the piece or parcel of land situated at Bhoivádá 3rd Row, or otherwise called Kandalla, and bounded as follows” (here follow the boundaries), “ and of which at present I am the sole surviving owner and Fazandár, as it having descended to me from my deceased father, Harjivandás Vandravandás. That the said Sutár Kahándás Nárandás shall conduct the case now pending in the Supreme Court of Judicature at Bombay (concerning the said piece or parcel of land wrongfully claimed by Mádhavráv Raghunáth and Anandráv Raghunáth, together with that of Purshotam Pránjivandás) at his own costs and necessary expenses. It is further agreed that after I have proved to the satisfaction of the Court that the said ground is my sole property, the said Sutár Kahándás Nárandás and myself should build a house, *chál*, or other building on the said ground at the joint expense of myself and the said Sutár Kahándás Nárandás, and whatever shall be realised from the building in the shape of rent or other profit shall be enjoyed by myself and Sutár Kahándás Nárandás jointly to the term of my natural life, reserving the said property in my name or in the name of my father as the same is standing. And that after my death the said piece or parcel of land, and the building that then be standing thereupon, shall and will be as the sole and absolute property of the said Kahándás Nárandás, his heirs, executors, administrators, or assigns. In witness whereof I set my hand and seal this 13th day of September in the year of Christ one thousand eight hundred and forty-nine.

Signed, sealed, and delivered
in the presence of
SUTA'R GOVARDHAN KESHAVJI.
RAGHUNA'TH HARICHANDA'S.

SHA' MUNILA'L HARJIVANDA'S'
signature, agreed as above ; his own
handwriting.”

The first defendant and appellant claimed to retain the premises under an indenture of mortgage, of the 4th of September 1866, granted in his favour by Haribháí Girdharlál, the administrator of Munilál Harjivandás, to secure the sum of Rs. 10,000 and interest ; and a deed of further charge, made by Haribháí Girdharlál in his favour on the 24th of August 1867, to secure a further advance of Rs. 4,000 and interest thereon.

The five other defendants were tenants of the first defendant, and did not appear at the hearing.

1871.
 DA MOIWAR
 MADHAVJI
 v
 KANARAO'S
 HARBANDAR.

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was, the instrument in question did not savour of champerty. He cited *Panchcowree Mahtoon v. Kalee Churn* (a); *Pitchakutti Chetti v. Kamala* (b); Marshall Rep. 303; *Fischer v. Kamala* (c); *Rámráv Khandarév v. Govind Pándshet* (d); *Hilton v. Woods* (e); *Dickenson v. Burrell* (f); *Harrington v. Long* (g); *Wood v. Griffith* (h); *Cockell v. Taylor* (i); *Tyson v. Jackson* (j); *Hartley v. Russell* (k). Third parties cannot raise this objection: *Knight v. Bowyer* (l), *Williams v. Protheroe* (m).

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Mayhew, contra, contended that if the intermeddling in the suit was the source of the plaintiff's claim to the property, as it was here, the plaintiff could not sue. He cited *Stephens v. Bagwell* (n); *Reynell v. Sprye* (o); *Stanley v. Jones* (p); *Earle v. Hopwood* (q); [BAYLEY, J., referred to *Grell v. Levy* (r);] *Grose v. Amirtamayji* (s). The parties here, having used an English form of instrument, must be taken to have contracted according to English law: Hyde's Calc. Rep. 159; *Webbe v. Lester* (t).

Anstey, in reply, cited as to parties *Hunter v. Daniel* (u); and as to champerty *Powell v. Knowler* (v); *Strachan v. Brander* (w); *Myers v. United Guarantee Assurance Co.* (x); *Punchanun v. Doorga Nath* (y).

Cur. adv. vult.

13th August 1870. BAYLEY, J. (after stating the facts, and the execution of the instrument of the 13th of September 1849), proceeded:—The defendant, Dámodhar Mádhavji, by his written statement alleged, in para. 6, “that the in-

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| (a) 9 Calc. W. R., Civ. R. 490. | (b) 1 Mad. H. C. Rep. 153. |
| (c) 8 Moo. Ind. App. 170, 187. | (d) 6 Bom. H. C. Rep., A. C. J. 63 |
| (e) Law Rep. 4 Eq. 432. | (f) 1 <i>Ibid.</i> 337. |
| (g) 2 Myl. & K. 590. | (h) 1 Swans. 43. |
| (i) 15 Beav. 103, 115. | (j) 30 <i>Ibid.</i> 384. |
| (k) 2 Sim. & St. 244. | (l) 23 Beav. 609. On App. 27 L. J. Ch. 520. |
| | (m) 5 Bing. 309. |
| (n) 15 Ves. 139. | (o) 1 De G. M. & G. 660. |
| (p) 7 Bing. 369. | |
| (q) 30 L. J., C. P. 217. | (r) 10 Jur. N. S. 210. |
| (s) 4 Beng. L. Rep., O. C. J. 1. | (t) 2 Bom. H. C. Rep. 52 (2nd ed.). |
| (u) 4 Hare 420. | (v) 2 Atk. 224. |
| (w) 1 Ed. 303. | |
| (x) 7 De G. M. & G. 112. | (y) Calc. W. Rep. for 1864, 300. |

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strument of the 13th of September 1849 was illegal and void for champerty, and that the same could not be enforced against him, Dámodhar Mádhavji ;” and that was the real—I may say, only—defence which was seriously urged at the hearing. An issue (the second) was framed in these terms: “Whether the said instrument was illegal and void, for champerty or maintenance ;” which, under the power given by the Sec. 141 of the Code of Civil Procedure, I have amended by adding the following words: “or as being contrary to public policy.”

I was favoured with extremely able and elaborate arguments, and a great number of cases from the English and Indian Reports were cited by Mr. Anstey for the plaintiff, and by Mr. Mayhew for the defendant, Dámodhar Mádhavji, the former arguing very ably that the agreement between Munilál and the plaintiff of the 13th of September 1849 did not savour at all of either champerty or maintenance, assuming even that such doctrines applied to Hindús, whilst the latter contended as strenuously for the opposite view.

I have carefully examined all the authorities cited by counsel, as well as several others which were not mentioned at the bar.

Very high legal authorities in India have denied that the law of champerty and maintenance applies to the natives of this country. In a case decided by the High Court of Madras in the year 1863, *Pitchakutti Chetti v. Kamala Nayakhan* (z), Scotland, C.J., in delivering the judgment of the Court, said: “Maintenance and champerty are made offences by the common and statute law of England, which in this respect has no application to the natives of this country, and in considering and deciding upon objections to the civil contracts of natives on the ground of maintenance or champerty we must look to the general principles as regards public policy, and the administration of justice upon which the law at present rests. To that extent we think the law can properly be adopted and applied in perfect consistency with the

(z) 1 Mad. II. C. Rep. 153.

Hindú law relating to contracts: see 1 Strange's Hindú Law 275. In this case the 'maintenance' is alleged to be the loan of money by the plaintiff to enable the defendant to sue and eject his tenant, Fondeclair; but that of itself is not sufficient. There should appear to be the instigation of improper litigation with a bad purpose or motive, contrary to public policy and justice." In a case decided at Calcutta by Peacock, C.J., and Jackson, J., in February 1868 (a), the Court, in remanding the case to the Judge of Tirhut to be tried upon the merits, said: "The Judge then says 'purchasing a suit is champerty.' But every purchase of a suit is not champerty, and the Judge does not show that the facts of this case amounted to champerty. There is no foundation whatever for the law laid down by the Judge that a chose in action is not assignable, and there are many cases (b) in the late Sadr Court, and one (c) in the High Court, which tend to show that champerty is not illegal in the Mofussil. In the face of those cases the Judge ought not to have laid down the law as to champerty in the positive manner in which he did lay it down. In trying the case *de novo* upon the merits, the Judge may find any facts, if any exist, which justify his assertion that this was a case of champerty, so that the parties, if they please, may have the question fully considered by this court, whether in the Mofussil a purchase amounting to champerty is illegal or not."

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In the following month, namely, April 1868, the point again came before the High Court at Calcutta, the Judges being Mr. Justice Macpherson and Mr. Justice Glover, in a regular appeal from the Principal Sadr Amín of Pátná (d). Mr. Justice Glover, in the course of his judgment, said: "As champerty is not a part of our statute law, and as successive decisions of our highest court have pronounced it inapplicable to this country, I do not feel justified in reopening the matter, or in referring it to a Full Bench. The

(a) 9 Calc. W. Rep., Civ. R. 243.

(b) Sadr Decisions for 1847, p. 609.

" " 1852, p. 394.

" " 1859, p. 1310.

(c) Marshall's Rep. 303.

(d) 9 Calc. W. Rep., Civ. R. 490.

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decision quoted by Mr. Piffard is to be found in the Şadr Diváni Adálat Reports for 1852, p: 394. This decision was passed by a full Bench, consisting of five Judges, after reviewing the older cases on the subject, and it decided that champerty was not *per se* illegal, but that every such arrangement must stand or fall according to the peculiar nature of its conditions. In this judgment the former decisions of the Şadr Court were considered, and held to have been erroneous, and after full argument it was decided that as between a plaintiff and a third party an issue could properly be admitted regarding the source from which the plaintiff procured funds for defraying the expenses of his action, that is to say, a suit ought not to be at once dismissed without a hearing, merely because the plaintiffs in the cause had agreed to divide the matter sued for between them if they prevailed at law, but that every such case should be looked at in its own merits, should a suit be brought to enforce or award its conditions. * * * The later decisions of this court have not gone further than to express doubts as to the application of the doctrine of champerty to our courts, but the result has practically been a regular following of the precedent of 1852. * * * It seems to me, therefore, to have been authoritatively ruled that as between a plaintiff and defendant in this country no question of champerty can arise, and as I am not prepared to dissent from that ruling, although I confess to some doubts of its propriety, I must decide this issue against the appellants."

Mr. Justice Macpherson concurred generally in that judgment, but on the question of champerty or maintenance which had been raised and discussed at length, and the law as to which could not yet be said to have been definitely settled, so far as that court was concerned, he deemed it unnecessary to express any opinion, as he agreed with Mr. Justice Glover in thinking that the appellants had a good defence on the merits.

In the most recent reported case that I have found on the point, decided on the 3rd of May 1870 by Mr. Justice Kemp

and Mr. Justice Jackson in the High Court at Calcutta (e), which was a suit by a Muhammadan Mukhtiár for the specific performance of an agreement, under which he advanced money to carry on a suit by members of a Hindú family to set aside alienations made by their father, on the understanding that he was to be entitled to a share of the estate recovered from the purchasers in the event of success, it was held that the agreement savoured of champerty, and that a suit involving such interference in the affairs of a Hindú family could not be countenanced.

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In Mr. Justice Kemp's judgment the following passage occurs:—"The Judge was of opinion that the case savoured of champerty, and he refers to a judgment of the learned Chief Justice Peacock to be found at page 260 of the 5th volume of the Revenue, Judicial, and Police Journal, in which that learned Judge said that, although 'he did not mean to say that the law of champerty is a law applicable to the Mofussil, still he thought that the courts would be exercising a very unsound discretion, and would be acting upon a very erroneous principle, if they would allow a stranger to interfere in family affairs on an agreement, between him and the real heirs, that if he could establish their claim he would be entitled to a share of the estate.'"

A very important case came before the High Court of Calcutta in 1869, on the subject of a contract which, it was alleged, was void from being of a champertous nature and contrary to public policy, and, therefore, illegal. I allude to *Grose v. Amirtamayí Dasi* (f), decided in April on the original jurisdiction side by Mr. Justice Phear, and on appeal by Peacock, C.J., and Macpherson, J., in August 1869.

There one of the issues (the third) raised by the learned Judge in the court below was: "Was the alienation to Grose absolutely void, as being contrary to public policy, within the operation of any law affecting champerty and

(e) 13 Calc. W. Rep., Civ. R. 427.

(f) 4 Beng. H. C. Rep., O. J. 1.

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maintenance?" Mr. Justice Phear says (p. 8): "As regards the third issue, it is a little difficult to say how far the English law against champerty and maintenance at present reaches." Then, after stating that still there undoubtedly does exist in England even now a law forbidding champerty and maintenance, and that the change which has taken place is not, properly speaking, in the law itself, but in the circumstances of society, which has so altered as to elevate a large class of transactions out of the mischief named champerty and maintenance, and thus to leave the subject shorn of its original dimensions, he proceeds (p. 9): "The purchase of a title pending in suit (even by a Queen's Counsel) is not now necessarily invalid, and the assignment of a *chose in action* is not of itself contrary to modern law.

"Nevertheless, as I have already said, the principle of public policy which once found action in these statutes is still operative, and the Courts, both of Law and of Equity, give effect to it as part of the Common Law of England. It is important, however, for the right understanding of its application, that it should not be confounded with any of the rules of Equity, under which a transaction between parties is judged of solely with regard to the conduct of the parties towards each other.

"The late Lord Justice Turner, in the case of *Knight v. Bowyer*, 27 L. J. Ch. 520, where 'objection was made on the part of the appellants to the title of some of the plaintiffs, upon the ground that their interests were acquired by means of a purchase which was illegal and invalid as being affected by the laws relating to champerty and maintenance,' said that 'in order to maintain the objection as an answer to the suit, the appellants must show that the purchase was illegal and void on principles of public policy, upon grounds far higher than the mere interests of the parties.' * * *

"So far, then" (proceeds Mr. Phear), "as the present issue is concerned, I have to look to the general nature of the transaction, and to consider it in reference to the interests

of the community at large, rather than to its merits as between the parties; and in this respect it is not nowadays a critical fact that the subject of the contract was matter in suit, or about to be put in suit: for, as Lord Justice Turner also remarked in the course of the above-cited judgment, the cases abundantly prove that property which is in litigation may be made the subject of sale and purchase. * * *

“Then, is the law which renders champerty and maintenance illegal in England part of the law which this court, in the exercise of its ordinary original jurisdiction, is bound to administer? Viewed in the light in which I have endeavoured to place it, I think it is. In other words, I think that the law which forbids and makes void all acts contrary to public policy and subversive of the general interest of society is in force at least within the presidency towns.”

The decree of Mr. Justice Phear was reviewed when the case came before C.J. Peacock and Macpherson, J., on appeal, and those learned Judges, after a very full and learned argument, held that the deed of the 4th of April 1859, which in the court below had been held to be wholly void, as being without definite consideration, and, being in the nature of a gambling transaction, not valid against heirs under Hindú law, and also void as being of a champertous nature and contrary to public policy, was, so far as it related to the moiety of the property assigned to Grose absolutely, not binding on the plaintiff, or on the persons who on the death of the widow might succeed to the property of her deceased husband; that, though not void on the ground of champerty, it was an unconscionable bargain and a speculative, if not a gambling, contract, and that there was no necessity for such an alienation by the widow. But the appellate court held that, so far as regarded the assignment of the moiety as security for the advances and expenses which Grose or his assigns might reasonably and properly make and incur for the maintenance of the widow for carrying on the necessary proceedings to enforce her rights, with 12 per cent. interest on such advances, it was not void, but created a charge upon

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that moiety which was binding upon the reversionary heirs of the husband to the extent of such advances and expenses. That the agreement of April 1859 was void by English law, as being a mere gambling transaction and contrary to public policy, and illegal, and that the law which would have been applicable to the case if it had been tried by a zillá court at Hugli, where the suit was originally instituted, was practically the same as the English law, whatever might be the nationality of the parties.

All the three Judges in that case quoted and acted upon a definition given by the Lords of the Judicial Committee of the Privy Council in a case decided in 1860, on appeal from the Şadr Diváni Adálat at Madras, a definition quoted and acted upon by C.J. Scotland in the case I have cited from 1 Mad. H. C. Rep. 153, and by Chief Justice Couch in a case heard by him and Gibbs, J., in March 1869, and reported in 6 Bom. H. C. Rep., A. C. J. 63.

In the last case, which may well be cited here (6 Bom. H. C. Rep., A. C. J. 63), R. had entered into an agreement with G., that if a suit which was then about to be brought by G. for the recovery of certain land should be decided in favour of G., R. was to pay G. Rs. 85, and G. was to make over to R. half the land recovered. R. was to pay to G. Rs. 50 in certain proportions, which R. was to lose if the suit were not decided in favour of G. G. recovered the land, and then R. sued him on the above agreement.

No issue had been taken in the Munsif's Court on the question whether the agreement was void for champerty. An issue was raised on this question by the appellate Judge, the Acting District Judge of the Konkan, and, no evidence being taken, was decided in favour of the defendant.

It was held by Sir Richard Couch (Gibbs, J., concurring), on special appeal, that as it was not manifestly apparent on the face of the proceedings that the agreement was against morality or public policy, the appellate Judge ought not to have held it void, and the court intimated its opinion that the agreement was not void on the ground of champerty—

at any rate, that it was capable of explanation by a consideration of the surrounding circumstances which the plaintiff should have an opportunity of giving in evidence; and the decree of the appellate court was reversed, and the suit remanded to it for rehearing.

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The law was stated by the Lords* of the Judicial Committee, in *Fisher v. Kamala Naicker (g)*, in the following words:—
 “The Court” (referring to the Sadr Court at Madras)
 “seem very properly to have considered that the champerty, or more properly the maintenance, into which they were inquiring, was something which must have the qualities attributed to champerty and maintenance by the English law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary. It was necessary, therefore, to look at the substance of the transaction, and not merely the language of the instruments” (p. 187).

Now apply that test, which appears to be the decisive one, in questions of this nature in India in the present case. I am of opinion that in the agreement between Munilál and the plaintiff there was nothing against good policy and justice, nothing tending to promote unnecessary litigation, nothing that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense existed.

The present case differs from all those cited before me, in that the party to the alleged champertous agreement to whom assistance was to be given, namely, Munilál, was neither a plaintiff nor a defendant in any suit then pending or about to be commenced.

The suit which was the cause of Munilál's application to the plaintiff had been brought against Purshotam Pránjivan-

* Lord Kingsdown, Lord Justice Knight-Bruce, Lord Justice Turner, Sir Edward Ryan, Sir John Coleridge, Sir Lawrence Peel, Sir James Colvile (a court of unusual strength).

(g) 8 Mod. Ind. App. 170.

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dás alone ; it was a simple action of trespass *quare clausum fregit* brought on the Plea Side of the Supreme Court ; and in those days when the old strict technical rules of pleading were in force, and which were not in fact abolished until pleadings were swept away upon the institution of the High Court in 1862, it would have been, I think, a somewhat unusual thing for a third party like Munilál to have asked that he might be joined as a defendant in such action of trespass, if indeed such an application could have been successfully made at all.

Assuming, however, that Munilál had by agreement with Purshotam prevailed on the latter to allow Kahándás, the present plaintiff, to conduct the defence of the suit, so as to obtain the object which Munilál and Kahándás apparently had in view, namely, to stop the action against Purshotam in so far as it related to any alleged or supposed claim over Munilál's vacant piece of land—an assumption hardly justified by the evidence, as Purshotam had not been served with the summons, or received notice in the proper course of business that the action had been brought against him—I do not see how such an arrangement was against public policy, or that it in any way tended to promote unnecessary litigation. The object was to stop litigation, and to procure for Munilál what he appeared to think was in danger from the action then pending, though it is difficult to see how any litigation in an action of trespass for damages brought by Mádhavráv and Anandráv Raghunáthji against Purshotam could interfere with or prejudice the right or title of Munilál to his vacant piece of land.

Munilál appears, however, rightly or wrongly, to have thought that it would, and in his penury, and in his alarm in his mistake and ignorance as to the real character and nature of the suit brought against Purshotam, hastens immediately to his friend and creditor, Kahándás Nárandás, the present plaintiff, proposes to him terms for his own protection for the future improvement of the property at their joint expense, and for the joint use and benefit of himself and

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The subsequent vexatious proceedings taken by Mádhav-ráv and Anandráv Raghunáthji in the Police Court, to try and get possession of the vacant piece of land, were not within the scope of the agreement of the 13th of September 1849, which was limited in terms to Kahándás Nárandás conducting the case then pending in the Supreme Court, which in fact he never did, as the suit was at once abandoned by the plaintiffs, and never came into court at all.

Then, when matters (as the plaintiff Kahándás said in his evidence) were quiet, he erected a temporary shed, paying Rs. 600 or Rs. 700 out of his own money in building it; and afterwards, in 1861 or 1862, a substantial building was jointly erected by Munilál and himself at their joint expense, the plaintiff furnishing Rs. 3,000, and Munilál, through his assistance, borrowing Rs. 2,000.

That was done in pursuance of the terms of the agreement of the 13th of September 1849, which provided that after Munilál had proved to the satisfaction of the Court that the said ground was his sole property (proof which, as it turned out, it was unnecessary for him to produce), Kahándás and he should build a house, *chál*, or other building on the said ground at their joint expense, the rents and profits whereof were to be enjoyed jointly by them during Munilál's life, and after his death the said piece or parcel of land, and building then standing thereon, were to be the sole absolute property of the plaintiff, Kahándás, his heirs, executors, administrators, and assigns, and under which provision the plaintiff now claims the property.

The agreement impugned by the defendant, Dámodhar Mádhavji, when its real nature is considered and the surrounding circumstances looked at, was not a transaction entered into in the course of "the traffic of merchandising in quarrels and huckstering in litigious discord," reprobated by Lord Justice Knight-Bruce in the case of *Reynell v. Sprye* (*h*). It was entered into solely for the defence, protection, and improvement of the property which Munilál considered was in danger of being taken from him.

(*h*) 21 L. J. Ch. 655.

In the cases of champerty cited at the bar in which the agreements were considered as illegal and void, the sharing of the property was the consideration of the advance or loan of money. But here Kahándás is not to have the land in consideration that he should conduct the suit pending in the Supreme Court in 1849. That is not the consideration, and the decisions as to champerty do not apply in the present case.

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Munilál does not agree or promise to give the vacant land over to Kahándás directly the suit is over. Had he done so, the authorities cited on behalf of the defendant might have been more in point. When Munilál had proved to the Court (it was he, be it remarked, and not Kahándás, who proposed to furnish the proof) that the ground was the sole property of Munilál, then, and not till then, the land, which at that time was comparatively valueless and produced no rent, was to be built upon at the joint expense of both parties to the agreement, and the rents during Munilál's lifetime were to be jointly enjoyed by each: so that an entirely new and valuable consideration for the agreement is introduced, or rather, I should say, new and material considerations, moving as well from Kahándás to Munilál as from Munilál to Kahándás, each party deriving considerable and substantial benefit from the agreement if its terms were duly carried out.

In *Prosser v. Edmonds* (i) Lord Abinger said: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce"—a passage quoted with approbation by Williams, J., in the year 1860, in delivering the judgment of the Exchequer Chamber in *Anderson v. Ratcliffe* (j), in which judgment he said: "Champerty is a species of maintenance, being a bargain with a plaintiff or defendant to divide the land, *campum partiri*, or other matters sued for, between them, if they prevail at law, where-

(i) 1 Y. & C. Exch. 481.

(j) El. B. & E. 806, 819; 28 L. J. Q. B. 32.

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upon the champertor is to carry on the party's suit at his own expense : see Russell on Crimes, Bk. II., Ch. 20" (p. 825).

Here Kahándás was not to get the land, or any portion of it, or of the building upon it, until after Munilál's death, and the agreement, as already pointed out, expressly provided for the erection of a building on it by both of those persons at their joint expense.

That was done. The building was erected at the joint expense of Munilál and the plaintiff, and they jointly enjoyed the rents as long as Munilál was alive. In other words, the agreement was acted upon by Munilál and by the plaintiff, and without objection from the other, from the time of its execution, in September 1849, without interruption for nearly fifteen years—namely, until Munilál's death in June 1864 ; and I see no reason to regard it in any other light than as a perfectly valid and binding contract. The defendant, following, apparently, what is not an uncommon practice in Bombay, did not trouble himself with investigating the title of the property on the supposed security of which he lent Haribhái Girdharlál Rs. 10,000 in September 1866 and Rs. 4,000 more in August 1867. * * *

There appears, therefore, to me to be no objection to the validity of the agreement of the 13th of September 1849, under which the plaintiff claims to recover possession of the property in question, an agreement which—the parties executing it being Hindús, and the document itself one under seal, having been sealed and delivered as an English deed—seems to comply with the requirements mentioned by the Lords of the Privy Council in a judgment delivered by them in March 1869, in *Raja Sahib Prahlad Sen v. Budhu Sing* and four other suits on appeal from the High Court at Calcutta (*k*), where they held that it is the established practice of the courts in India, in cases of contract, to require satisfactory proof that consideration has been actually received according to the terms of the contract, and that a contract

(*k*) 2 Beng. L. Rep., P. C. 111.

under seal does not of itself in India import that there was a sufficient consideration for the agreement.

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Being as I am clearly of opinion that the agreement was and is a valid and *bonâ fide* one, of which the plaintiff can claim the benefit in this suit, it becomes unnecessary to consider the point argued at the bar, whether the defendant, Dámodhar Mádhavji, who was not a party to it, can be allowed to contend that the agreement was illegal, as being of a champertous character.

From the above judgment the first defendant appealed. The appeal came on for hearing on the 2nd of March 1871, before WESTROPP, C.J., and MELVILL, J.

B. Tyabji (with him *Mayhew*), for the appellant:—The deed of 1849 is void for champerty. [WESTROPP, C.J.:—Suppose, for a moment, it savours of champerty; the executing party, *i.e.*, the vendor, took no objection to it. He induced the plaintiff to expend money in building on the land, and he himself, so long as he lived, enjoyed a share in the fruits of the money so laid out. After that, would it now be equitable to allow your client, who claims through the administrator of the vendor, to avoid the deed?] The representatives of Munilál ought to have been brought before the court. [WESTROPP, C.J.:—Why? This was not a mortgage. It was a sale out and out from the death of Munilál. Munilál's heirs have now no claim whatever to the land.]

Anstey and *McCulloch*, for the respondent, were not called upon.

WESTROPP, C.J.:—As Munilál had neither sons, grandsons, nor other issue, and did not dispute the validity of the deed, or the rights the plaintiff may have acquired under it, but induced the plaintiff to expend his money in building on the land on the faith of the deed, and enjoyed, pursuant to its terms, a share in the profits of the capital thus expended, the defendant cannot now be allowed to dispute its validity. It is not necessary for us to express any opinion as to the extent to which the law of champerty is applicable in the Presi-

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clency town, or in the Mofussil; but we may say this much, that we do not remember any case in which an agreement to advance money in defence of an existing possession of property has been held to be champertous. The decree must be affirmed.

Decree affirmed with costs.

Attorneys for the plaintiff: *Acland, Prentis, and Bishop.*

Attorney for the defendant: *C. Tyabji.*



March 9.

THE ASIATIC BANKING CORPORATION (LIMITED),
 in Liquidation..... *Plaintiffs.*

AMADOR VIEGAS and another, Administrators
 of the Estate of Amador Viegas (the
 younger) *Defendants.*

Administrator—Distribution of Assets—Knowledge of Debt—Actual Knowledge—Calls—Act X. of 1865, Sec. 282—Indian Succession Act.

Semble that an administrator who pays such debts as he knows of otherwise than *equally and rateably as far as the assets of the deceased will extend*, in accordance with the provisions of Sec. 282 of Act X. of 1865, is personally liable for any loss occasioned to a creditor of the deceased by such improper distribution of the assets.

In order to charge such administrator, his knowledge must be actual, as distinguished from a constructive or imputable knowledge.

A liability to pay calls is a debt within the meaning of the above section (282 of Act X. of 1865).

THE facts of this case sufficiently appear from the judgment of the Court.

The case came on for hearing before GREEN, J., on the 13th of January 1871.

Farran (with him *the Honorable A. R. Scoble*, Advocate General), for the plaintiffs:—The defendants, the administrators of Amador Viegas the younger, knew that the intestate was possessed of fifty shares in the plaintiffs' Company, for the shares are mentioned in the inventory filed by the defendants. They must also have known that the Corporation was being wound up in the early part of 1867, for it was a

matter of common notoriety in Bombay, and these shares are actually entered in the defendants' inventory as unsaleable. From these circumstances the Court will infer that they had knowledge of the intestate's liability on these shares, or at least that they had the means of knowing it, as the most cursory inquiry with reference to these shares would have disclosed that they were not fully paid-up shares, and that calls were about to be made upon them. The defendants have given no notices under Sec. 42 of Act XXVIII. of 1866; they have distributed the estate without taking the most ordinary precautions to ascertain the claims upon it. That being so, the Court will presume that they knew what they ought to have known.

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Whatever may have been the law prior to the passing of the English Companies' Act of 1862, since then the liability of a shareholder to contribute to the assets of a company is a debt payable when the calls are made—a *debitum in præsentia in futuro solvendum*: 25 & 26 Vict., c. 89, s. 75; *Williams v. Harding* (a). It is not contended that it is here a specialty debt, but it is a debt, and one of which the defendants had knowledge. They were bound then to pay it, or to set apart a sum for the payment of it, proportionately with the other debts of the intestate, so as to carry out the intention of Sec. 282 of the Indian Succession Act, and not having done so, the defendants are now personally liable to pay the amount which the plaintiff would have received if the assets of the intestate had been rateably divided amongst his creditors.

Macpherson (with him *McCulloch*), for the defendants:—Admitting, for the purpose of this argument, that this liability is a debt, the defendants had not knowledge of it. That is sworn to, and there is no reason why the Court should not believe what is so stated.

Cur. adv. vult.

March 9. GREEN, J.:—This a suit to recover from the defendants, who are administrators of the estate of the late Amador Viegas the younger, the sum of Rs. 15,000 due for

(a) Law Rep. 1 Eng. & I. App. 9.

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calls in respect of fifty new shares in the Asiatic Banking Corporation, of which the said Amador Viegas the younger was the registered holder at the time of his death.

By an order of the High Court of Chancery in England, dated the 3rd day of November 1866, the Asiatic Banking Corporation, a joint stock company incorporated by Royal Charter, was ordered to be wound up by the said court under the provisions of the English Companies' Act, 1862. By a certificate of the Chief Clerk, dated the 17th of July 1867, the name of Amador Viegas is certified to be included (with others) in the list of contributories to the company as the holder of fifty new shares, and by an order of the said court, dated the 12th of November 1867, a call of £10 per share was made on the holders of the new shares, including (amongst others) the said Amador Viegas, and the amount of such call was ordered to be paid into the Oriental Bank at Bombay on or before the 18th day of January 1868. By another order of the said court, dated the 26th of May 1868, a further call of £20 per share was made on the holders of new shares, including the said Amador Viegas, and the same was to be payable to the Oriental Bank at Bombay; as to £8 per share (part of the said call), on or before the 1st of August 1868; as to £6 per share (further part of the said call), on or before the 1st day of February 1869; and as to the sum of £6 (residue of the said call), on or before the 1st day of May 1869.

The shareholder Amador Viogas died before the winding-up order, and on the 25th of September 1866, intestate. Shortly after his death, and on the 12th of November 1866, the defendants applied for, and on the 12th of February 1867 obtained, from this court, a grant of administration to the estate of Amador Viegas the younger. On the 18th of November 1867 the liquidators in London sent a circular addressed to the deceased at Bombay, giving notice of the call made by the order of the 12th day of the same month. This circular, which is not now produced, appears to have come to the hands of the defendants, as by a letter, dated the 8th of January 1868, and addressed to the liquidators, they

acknowledge its receipt, and write as follows :—" We are in receipt of your circular, dated the 18th of November last, in respect to calls on the shares held by the deceased Amador Viegas, junior. In reply, we beg to state that he died in September 1866, intestate and insolvent. The undersigned obtained letters of administration from the High Court, and realised the little property he had, together with a few shares in different joint-stock companies. The deceased's liabilities amounted to nearly Rs. 55,000, and his assets realised only Rs. 37,000. We, accordingly, compromised with his creditors in the best way we could possibly do it, closed the accounts, and handed them to the court in August last. The balance in favour of the estate is Rs. 202-4-7, at your disposal. The deceased left a widow and three children unprovided for, and we are obliged to maintain them at our own and other friends' expense." On the 20th of April 1868 the solicitor in Bombay of the liquidators wrote to the defendants, requiring payment of the call, and the defendants, on the 27th of the same month, wrote to the same effect as their letter of the 8th of January 1868 already mentioned. No steps seem to have been taken for some time after the death of the intestate, and after the grant of administration to the defendants to substitute their names for that of the deceased in the list of contributories of the corporation, though the fact of such grant of administration came to the knowledge of the liquidators in January or February 1868; but by an order of the Court of Chancery, dated the 6th of April 1869, it was ordered that the list should be amended by striking out the name of Amador Viegas, and substituting the names of Amador Viegas the elder and Gabriel Viegas, as the administrators of the said Amador Viegas, deceased, in respect of the fifty new shares standing in his name, and that a call of £30 per share be made upon the said Amador Viegas the elder and Gabriel Viegas, as such administrators of the said Amador Viegas, deceased, and that the said Amador Viegas the elder and Gabriel Viegas, as such administrators as aforesaid, on or before the 21st day of June 1869, or within four days after service of that order, should, out of the assets of the said Amador Viegas, deceased, in a due course of

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administration, pay into the Oriental Bank at Bombay the amount which would be due from the estate of the said Amador Viegas, deceased, in respect of such call.

By the plaint in this suit, which was filed on the 14th of June 1870, the contention is put forward that the liability of the estate of the intestate to pay calls in respect of the said fifty new shares was of the nature of a specialty debt, and that the defendants ought to have retained sufficient assets of the deceased to pay the said calls in priority to liabilities of the said estate on simple contract, which the defendants did not do, and that so far as the defendants have not sufficient assets of the deceased to satisfy the liability of the said deceased in respect of the said calls, they ought to be held personally liable to satisfy the same. The relief prayed by the plaint is that the defendants, as administrators of the said Amador Viegas, deceased, may be decreed to pay to the plaintiffs the sum of Rs. 15,000 due for calls, with interest at nine per cent. per annum from the 22nd of June 1869, and that, if the defendants shall not admit assets come to their hands sufficient to pay the said amount, that an account may be taken of the estate and effects of the said intestate come to their hands, and of their application thereof, and that if it shall appear that the defendants have improperly paid away or disposed of the same, or any part thereof, in priority or preference over the plaintiffs' claim, the defendants may be personally charged with, and ordered to pay to the plaintiffs, the amount so improperly paid away or disposed of, or so much thereof as may be sufficient to satisfy the plaintiffs' claim in this suit.

At the hearing of the suit the defendants' counsel admitted that the intestate was a shareholder in the bank to the extent alleged, and also that the winding-up order and orders for call had been made as alleged, and the only issue settled or asked for was as follows:—Whether the plaintiffs are entitled to recover from the defendants any and what sum in addition to the sum of Rs. 202-4-7 in respect of the cause of action mentioned in the plaint. It was also agreed

by the counsel for the plaintiffs and defendants respectively, that in the event of the court holding that the defendants are liable in respect of their mode of distribution of the intestate's estate, the amount of such liability should be taken at Rs. 7,000, without further going into the accounts of the administration; but the plaintiffs' counsel reserved and insisted on the right of the plaintiffs, in case the opinion of the court should be against them on that question, to have the accounts taken in the ordinary way.

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The plaintiff's counsel abandoned—and, I think, properly—the contention set up in the plaint, that the liability to pay calls is, as against these defendants, of the nature of a specialty debt, and one which on that account ought to have been provided for before the debts of the intestate on simple contract were paid or satisfied. The 75th section of the English Companies' Act, 1862, which provides that the liability of a person to contribute to the assets of a company winding up under that Act shall be of the nature of a specialty debt, is restricted to England and Ireland; and as the intestate in this case was, at the time of his death, domiciled in the Bombay Presidency and resided at Bándorá, the liability of his estate to pay the call ought not, I think, to be deemed to be of the nature of a specialty debt, on the ground that the law of distribution of assets of a deceased person (including questions of preferential claims by particular creditors of the estate to payment) is the law of the domicile of the intestate, and by this law specialty debts have no priority over others (a). By Sec. 282 of the Indian Succession Act, 1865, it is provided, “save as aforesaid” (i.e., save in respect of funeral expenses, deathbed charges, testamentary and administrator's expenses, and certain wages), “no creditor is to have a right of priority over another by reason that his debt is secured by an instrument under seal, or on any other account. But the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend.”

(a) See *Pardo v. Bingham*, L. R. 6 Eq. 485.

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Now having regard to Sec. 75 of the English Companies' Act, 1862, it is clear that there was a debt due from the deceased, at the time of his decease, to the extent of the uncalled amount of the shares held by him, but payable at the time or respective times of making calls for enforcing such liability; and the question on the present hearing really seems to turn on this, whether, when the defendants satisfied the claims of other creditors of the intestate, or otherwise disposed of his assets, they knew of the claim of the plaintiffs? In all cases of doubt it is much better and safer for executors and administrators to advertise for claims, as provided by Sec. 320 of the Act above cited, and Sec. 42 of Act XXVIII. of 1866. But the Acts just cited do not provide that an executor or administrator not resorting to the course pointed out in those sections shall be deemed to have had notice of any claims which such advertisements might have called forth, and the present case, as I have said, in my opinion, really turns on Sec. 282 of the firstnamed Act. By the law as it stood before the Indian Succession Act, 1865, an executor or administrator might safely pay a debt by simple contract if he had no notice of the existence of a debt of a superior degree, as of a debt by specialty. And the notice of the debt of a superior degree necessary to be shown on the part of the executor or administrator, in order to charge him by reason of improper payment of simple contract debts, was *actual* notice (*see* Williams on the Law of Executors and Administrators, 5th ed., p. 930), though it seems not to have been necessary that a suit to enforce such higher debt should have been brought in order that the executor or administrator should be deemed to have had notice of that debt (*see* the observations of Parke and Patteson, JJ., in the case of *Oxenham v. Clapp* (b)). I think this affords a guide to the proper interpretation to be put on Sec. 282 of the Indian Succession Act, and I am of opinion that the knowledge there intended must be deemed to be an actual, as distinguished from a constructive or imputable knowledge—knowledge of a call having been actually made at the time

the defendants disposed of the intestate's estate. Of that there can, of course, be no question here, as the order for the first call is dated the 12th of November 1867, and the defendants allege that the estate of the deceased had been already disposed of in or previously to the month of August in that year, in the manner shown by the inventory signed by them on the 31st of August 1867, and filed in court on the 14th of December 1867. Of the call made by the order of the 12th of November 1867, they seem to have had actual knowledge some time in December 1867, by means of the circular of the liquidators in England dated the 18th of November 1867, and already referred to.

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Then can it be said that the administrators had knowledge of the debt created in respect of the uncalled-up amount of the shares in question, by the operation of Sec. 75 of the English Companies' Act, 1862, by reason of their knowledge of the intestate's fifty shares in the bank at the time of his death? That they had this knowledge is clear from the fact that they enter these shares in the inventory as forming part of the assets of the intestate; but there is no sufficient evidence, in my opinion, that they had any actual knowledge that the shares were not fully paid, or that any liability existed in respect of them. By inquiring, no doubt, they might have discovered that there was such liability, and that it was likely to be enforced; and in that sense, no doubt, they had knowledge of the debt. But such a knowledge would not be actual, but constructive knowledge, and, as I have said, in my opinion, Sec. 282 of the Indian Succession Act ought not to be interpreted as including a knowledge which is constructive only. Had there been in the present case any evidence of undue precipitancy in disposing of the assets, or of fraud or anything unfair in their conduct, it would have afforded strong ground for inferring actual knowledge by the administrators of the debt due to the plaintiffs; but, in my opinion, it cannot be justly said that there is such evidence. On the question of what is considered undue precipitancy in paying simple contract debts where it afterwards turns out that specialty debts existed, I

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may refer to the case of *Nosotti v. Jefferson* (c), where it was held that an executor in England of a testator who died in India, who had paid simple contract debts nine months after the testator's death, not having then notice of a specialty creditor in India, was justified in doing so, and did not thereby bring himself under personal liability to the specialty creditor.

I am of opinion, therefore, on the question whether the defendants are personally liable to the claim of the plaintiffs by reason of their having paid certain creditors of the deceased, to the exclusion of the plaintiffs' claim, either in full or beyond the equal and rateable proportion according to which such creditors ought to have been paid, having regard to Sec. 282 of the Indian Succession Act, that they are not so liable. But in pronouncing this conclusion I do not, of course, express any judgment or opinion that the defendants can justify all the payments mentioned in the inventory (other than those of debts due from the estate) as against the claim of a creditor; and unless the parties can come to some amicable settlement an account must be taken.

The decree of the Court is that the defendants, as administrators of the estate of Amador Viegas, deceased, in due course of administration, are liable to pay to the plaintiffs the sum of Rs. 15,000, or an equal and rateable proportion thereof, having regard to the other debts and liabilities of the said Amador Viegas, deceased; that it be referred to the Commissioner to take an account of the estate and effects of the intestate Amador Viegas come to the hands of the defendants or either of them, or of any other person or persons by the order or for the use of the defendants or either of them, and of the application of the same by the defendants or either of them; and that the Commissioner do also take an account of the debts of the said intestate, specifying which of them have been paid or satisfied, and which of them, wholly or how much on account thereof, have or has remained due and unsatisfied; and that the said Commissioner do further certify

and report to the Court how far, in his opinion, and having regard to the finding of the Court on the issue settled in this suit, the application by the defendants of the assets of the deceased with which they respectively may be found chargeable has been proper under the circumstances, or otherwise. I reserve further direction and costs.

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Attorneys for the plaintiffs: *Manisty and Fletcher.*

Attorneys for the defendants: *Dallas and Lynch.*

Original Suit No. 553 of 1870.

March 9.

HA'JI JIVA' NUR MUHAMMAD.....*Plaintiff.*
A'BUBAKAR IBRA'HIM MEMAN.....*Defendant.*

Attachment before Judgment—Property outside the Jurisdiction of attaching Court—Civ. Proc. Code, Sec. 81.

The High Court has no power to attach before judgment a defendant's property situate outside the limits of its ordinary original civil jurisdiction.

ON the 27th of February 1871, *Latham*, on behalf of the plaintiff, moved before WESTROPP, C.J., and GREEN, J., for an order to attach before judgment certain moveable property of the defendant in his shop at Karáchi. In moving for the rule, *Latham* relied upon the case of *In re R. J. Abraham (a)* and the arguments there used, and Act XIV. of 1869, Sec. 10.

Cur. adv. vult.

9th March 1871. WESTROPP, C.J.:—This is a suit in respect of a partnership alleged to have existed between four persons, namely, the plaintiff, Náthá Nur Muhammad, Detardiná Nur Muhammad, and the defendant. The plaint states that Náthá Nur Muhammad and Detardiná Nur Muhammad have retired from the partnership, and assigned their respective interests therein to the plaintiff. The partnership is stated to have been for the sale at Karáchi, in Sind, of

(a) 6 Bom. II. C. Rep., A. C. J. 170.

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goods purchased by the plaintiff and Náthá and Detardiuá Nur Muhammad at, and supplied from, Bombay to the partnership shop at Karáchi, which was under the management of the defendant, who used from time to time to make remittances from Karáchi to the plaintiff and two other partners in Bombay in payment for the goods. The plaint further alleges that Rs. 44,096-14-2 are due from the defendant to the plaintiff for goods so supplied to the defendant, and prays a dissolution of the partnership, an account of the partnership transactions, &c., and an injunction against the sale or alienation of the partnership goods or stock in trade by the defendant, and against his collecting the debts due to, or outstanding assets of, the partnership, and for a receiver.

Leave to institute this suit, under Sec. 12 of the Charter of 1865 of this court, was granted by Mr. Justice Green, part of the cause of action (namely, the purchase of the goods in Bombay) appearing to have arisen within the original local jurisdiction of this court.

The hearing of this cause has not yet taken place. An application was, however, made to Mr. Justice Bayley in chambers for an order, under Secs. 81 and 83 of the Civil Procedure Code, that "a warrant should issue to the proper officer at the District Court of Karáchi commanding him to call upon the defendant, within fourteen days from the service of the said warrant, to appear before the sitting Judge in chambers at the High Court house, Bombay, and show cause why the defendant should not furnish security in the sum of Rs. 44,096-14-2, to the satisfaction of this court, to fulfil any decree that may be passed against him in this suit;" and for a direction "that the property specified in the application" (namely, all the goods, furniture, and effects in the defendant's shop and warehouse respectively situate at Šadr Bazár in Karáchi, of the estimated value of Rs. 12,000 or thereabouts) "should be attached, until the further order of this Court, in manner provided by Sec. 83 of the Code of Civil Procedure, and that the warrant so issued be transmitted to the District Court of Karáchi for execution."

Mr. Justice Bayley had doubts as to the authority of this court, or of a Judge thereof, to make such an order, and was prevented by the Criminal Sessions from disposing of the application, which was, therefore, renewed before my brother Green, in chambers, who, also entertaining doubts as to the jurisdiction to make such an order, mentioned the matter to me. In consequence of the importance of the question, and also as there had been a decision on a nearly similar question *In re Abraham*, reported 6 Bom. H. C. Rep., A. C. J. 170, it was arranged that the application should stand adjourned into court, in order that the question might be argued before two Judges. It was accordingly argued on Tuesday the 28th ultimo, by Mr. Latham, counsel for the plaintiff (the applicant), before Mr. Justice Green and myself. Mr. Latham of course relied upon the case in 6 Bom. H. C. Rep. already mentioned, and stated that he was unable to find any other reported decision upon the point.

That case (*In re Abraham*) was one of a warrant issued by the Court of the Assistant Commissioner of Berár, in pursuance of an order by that court, for an attachment before judgment of moneys belonging to the defendant, in a suit in the same court, which moneys were deposited with the Oriental Bank Corporation at Bombay. The warrant was indorsed, under Act XXIII. of 1840, Sec. 1, by a Judge of the High Court, for execution within its local jurisdiction. The validity of that indorsement was reconsidered by the same learned Judge and another, upon a petition presented for the purpose of having it set aside, and the indorsement was upheld. It was there contended for the petitioner that the warrant of the Assistant Commissioner of Berár was one which he had not any power to issue, under Sec. 81 of the Civil Procedure Code, and, therefore, that it should not have been indorsed for execution by a Judge of the High Court, inasmuch as Act XXIII. of 1840 does not even purport to enlarge the jurisdiction of the Mofussil courts, but merely conferred upon the Supreme Court, now represented by this court, the power of executing the process of the Mofussil courts, i.e., such process as they had power to issue, and that

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if they have not power *aliunde*, Act XXIII. of 1840 does not bestow it upon them; and it was added that, if this were not so, the curious result would follow that the Mofussil courts could attach property before judgment within the local limits of the jurisdiction of this court, whereas this court could not do so within the local limits of the jurisdiction of the Mofussil courts.

Mr. Latham, in his argument before us in the present case, in discussing *In re Abraham*, admitted that Act XXIII. of 1840, Sec. 1, could not support the decision in that case, if the Court of the Assistant Commissioner of Berár had not jurisdiction under the Civil Procedure Code to make the order, and issue the warrant upon it, for attaching, before judgment, property of the defendant situated in parts of British India beyond the local limits of the jurisdiction of the Berár court, and in that view we agree. But the same learned counsel argued that, under Sec. 81 of the Civil Procedure Code, the Berár court had authority to make the order and issue the warrant which it did; and that the warrant was, accordingly, rightly indorsed for execution by a Judge of this court, and, therefore, that the Berár case was in point here: for, if the Berár court had such power under the Civil Procedure Code alone, so must this court, which, under its present Charter, followed the Civil Procedure Code until the Judges make general rules in substitution for its provisions. Mr. Latham relied on the following passage in the judgment *In re Abraham*:—"We are of opinion that Sec. 81 of the Code of Civil Procedure, under which the warrant issued, does not require the property to be attached before judgment to be within the jurisdiction of the court issuing the warrant. That section sets out two states of facts: (1) if a defendant is about to dispose of his property, or any part thereof, or (2) to remove any such property from the jurisdiction of the court where the suit is pending, in either case the court may direct that any property, moveable or immoveable, belonging to the defendant shall be attached. As regards the property mentioned under the first state of facts, it does not matter whether it be within or without

the jurisdiction of the court. The Code further provides that attachment before judgment shall be made in the same manner as attachment after judgment in execution of a decree for money" (Sec. 85).

Assuming, but not deciding, that it has been satisfactorily established by affidavits that the defendant is about to dispose of the goods, furniture, &c., in the shop and warehouse at Karáchi, with intent to obstruct or delay the execution of any decree that may be passed against him by this court in this suit, the question is whether this court has power to issue a warrant to the District Court at Karáchi, or any officer thereof, to call upon the defendant to appear, within a given time, before the sitting Judge in chambers at this court-house in Bombay, and show cause why he should not furnish security, in the sum already mentioned, to fulfil any decree that may be passed against him in this suit, and in the interim to direct the attachment, until further order, of the said goods, furniture, &c., at Karáchi.

Further assuming that the proposed order is not in form faulty in not following with sufficient closeness the language of Sec. 83 of the Code of Civil Procedure, or that we modify the form of order so as to render it conformable to that section, the question remains—Can we, under that Code, attach property, moveable or immoveable, at Karáchi, which is a place outside our local jurisdiction? That question depends upon the construction to be given to the Code. It must be specially borne in mind that the step which we are requested to take is a proceeding *in rem*, and not *in personam*, and is completely the creature of the Code, and was not by the Legislature originally intended to be applicable to the High Courts, but to the Mofussil Courts only. *Primâ facie* when we look to enactments relating to the powers of a court over the property of litigants, we should expect to find those enactments concerned with property, whether it be moveable or immoveable, which is situated within their local jurisdiction. Even Courts of Equity in England and America, which exercise the widest jurisdiction, do not attempt to operate directly *in rem* when the *res* is beyond their

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local jurisdiction, but act *in personam* only, and so deal with the person within their jurisdiction as to induce him to act with regard to the *res* outside the jurisdiction as the rules of Equity deem to be just: *Penn v. Lord Baltimore* (b); Story's Conflict of Laws, plac. 543, 544, 549 (*et ibid.* N. 2), 550, *et seq.* (6th ed.); *Earl of Oxford's case* (c). Again, the mode of enforcing an Irish or foreign judgment in England, or an English or foreign judgment in Ireland, or a judgment in one of the United States in another of them, is not by process of execution issued directly on such judgment, but by an action brought upon it: *Duchess of Kingston's case* (d); 1 Kent. Com. 284, 10th ed.; 2 *ibid.* 100, 102; Story's Conflict of Laws, ch. 15, pl. 584 *et seq.* If greater facilities be desired for the execution of judgments beyond the local limits of the jurisdiction of the courts which have pronounced them, resort, it would seem, must be had to special legislation. Such legislation there has been for the Civil Courts of British India in Secs. 284 to 295, inclusive, of the Civil Procedure Code. The enactments contained in those sections dispense with the necessity for bringing an action upon a decree when sought to be executed within the jurisdiction of a different court from that in which it was pronounced, by enabling the latter court to transmit a copy of the decree to the other court, together with a certificate that satisfaction of such decree has not been obtained by execution within the jurisdiction of the court so transmitting the copy of the decree and certificate, and a copy of any order for execution of such decree that may have been passed (Sec. 285). The court to which those documents are transmitted is bound to file them without further proof, unless, under any peculiar circumstances, to be specified in its order, it shall require such proof (Sec. 286). The copy of any such decree or order for execution when filed in that court has, for the purpose of being executed, the same effect as a decree

(b) 1 Ves. Sen. 444; *et ibid.*, per Lord Hardwicke, 447, 454, S. C.; 2 Wh. & Tu. L. C., 664, 668, 678, 680 (1st ed.)

(c) 2 Wh. & Tu. L. C. *in notis* 463 (1st ed.).

(d) 2 Sm. L. C. 448 *et seq. in notis* (3rd ed.).

or order for execution made by it, and may, if that court be the principal civil court of original jurisdiction in the district, be executed by it, or any of its subordinate courts to which it may intrust the execution of the same (Sec. 287). It has no power to inquire into the validity of the decree, unless it appear on the face of it that the court by which it was made had not jurisdiction to make it (Sec. 288).

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The 296th section is, upon the question now before us, very important. It provides that the rules contained in Ch. 4 (which relates to the execution of decrees, and extends from Sec. 199 to Sec. 296 inclusive) "shall be applicable to the execution of any judicial process for the sale of property, or for the payment of money which may be ordered by a civil court in any civil proceeding." It cannot be said that an order for attachment before judgment, or such an attachment itself, is judicial process for the sale of property, or for the payment of money which may be ordered by a civil court in a civil proceeding. The case, so far, is manifestly one for the application of the rule *expressio unius, exclusio alterius*.

But it is argued that in Secs. 81 and 83 there have not been any words introduced which limit the property, there rendered liable to attachment before judgment, to property within the local jurisdiction of the court in which the suit has been brought.

We are not by any means confident that this argument is well founded, and that there is not enough, on the face of the 81st section (which must be read with the 83rd section), in the reference to removal of property from the jurisdiction of the court, to lead us to the conclusion that those sections related solely to property situated within the local limits of the court's jurisdiction. Admitting, however, for the sake of argument, that there are not any words in themselves tending to confine the property liable to attachment before judgment to property within the local limits of the jurisdiction, we find, on referring to the sections relating to the execution of decrees, such as Secs. 200, 201, 203, and 205, language quite as comprehensive as that in Secs. 81 and 83.

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We would more especially refer to Sec. 205, which is as follows:—"The following property is liable to attachment and sale in execution of a decree, namely, lands, houses, goods, money, bank-notes, cheques, bills of exchange, promissory notes, &c., &c., and all other property whatsoever, moveable or immoveable, belonging to the defendant, and whether the same be held in his own name, or by another person in trust for him or on his behalf." That language is at first sight almost as comprehensive as possible, yet the Legislature manifestly was of opinion that further special provisions, such as already noticed in Secs. 284 to 296, were necessary, in order to admit of the immediate execution of decrees, orders for execution, and judicial process for the sale of property, or for the payment of money in districts not within the local limits of the jurisdiction of the court in which such decrees, orders, &c., were originally made or issued. If such special provisions were necessary in such cases, it would seem to follow *à fortiori* that notwithstanding the description in Secs. 81 and 83 of the property liable to attachment before judgment, similar provisions would be necessary in the case of such attachments. No such provision has been made. No authority has been given to a court, other than that in which the suit has been brought, to carry out an attachment in that suit before judgment. If the original court has not power immediately to execute its own decrees in the district of another court, and execution of them can be only obtained by the intervention of the latter, we should require some very distinct language on the part of the Legislature to show that it intended that the court in which the suit is brought can make or execute any order of attachment before judgment of property situate beyond the local limits of its jurisdiction.

The last argument to be noticed is that founded on Sec. 85, which directs that "the attachment shall be made according to the nature of the property to be attached *in the manner* hereinafter prescribed for the attachment of property in execution of a decree for money." That, we think, manifestly refers only to such provisions as are subsequently

made in the Code, as Secs. 232 to 239 inclusive, with regard to the mode or manner of attachment of the various kinds of property, and not in any respect to the district in which it may be made.

We have had the great advantage of fully consulting our brothers Gibbs and Melvill, who decided the case *In re Abraham*, and are authorised by them to say that on reconsideration of the points involved in it, they have arrived at the same opinion which we have, namely, that the ruling there made cannot be sustained. They, however, are not to be understood as pledged in all particulars to the course of reasoning by which we have come to that conclusion.

Mr. Latham's motion for the attachment before judgment sought for in the present case must be refused, on the ground that, under the Civil Procedure Code, a civil court cannot attach before judgment property situated beyond the local limits of its jurisdiction.

Motion refused.

Attorneys for the applicant : *Acland, Prentis, and Bishop.*

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March 27.

Insolvency—Final Discharge—Opposing Creditor—Grounds of Opposition—Personal Discharge previously granted without opposition—Stat. 11 & 12 Vict., c. 21, ss. 47 and 60.

An opposing creditor who has not filed grounds of opposition to, or opposed, the personal discharge (under Sec. 47 of the Indian Insolvent Debtors' Act) of an insolvent trader, can nevertheless come in and oppose the insolvent trader's application for his final discharge under Sec. 60 of the Act.

The grounds of such opposition may include matters which might have been put forward as grounds for opposing the insolvent trader's personal discharge under Sec. 47 of the Act, and need not necessarily be confined to matters either not known at, or that have occurred since, the time of the personal discharge being granted.

The Court, in considering whether it will grant or refuse to an insolvent trader his final discharge, will take into consideration the whole course of the mercantile dealings of the insolvent trader, and will not confine itself to his conduct with reference to the opposing creditor merely.

THE insolvents in this case filed their petition and schedule on the 1st of August 1870. A rule *nisi* having been

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granted to them in the usual course, they obtained their discharge, under Sec. 47 of the Indian Insolvent Debtors' Act, on the 17th of October 1870. Grounds of opposition to such discharge were filed on behalf of one Nathu Lakhmidás, but his opposition was withdrawn on the day the matter came on for hearing, and the insolvents obtained their discharge.

On the 21st of November 1870 the insolvents applied for and obtained a rule *nisi* for a final discharge in the nature of a certificate under Sec. 60 of the Act.

The rule *nisi* came on for hearing on the 16th of January 1871, when Mr. Reid, of the firm of Messrs. Finlay, Scott, & Co., applied for leave to oppose the discharge of the insolvents. Leave was then granted to him to file his grounds of opposition, and the hearing of the insolvents' petition was for that purpose adjourned until the 6th of February 1871, when it came on for hearing. The matters that formed the ground of the opposition of Messrs. Finlay, Scott, & Co. were all known to Mr. Reid before the time when the insolvents' personal discharge was granted, but he stated that he did not then oppose, because he thought he should have been able to have urged his grounds of opposition, when called as a witness by Nathu Lakhmidás, by whom he had been summoned as a witness. Mr. Reid was not, however, called, as Nathu Lakhmidás withdrew his opposition to the insolvents' discharge.

The history of the insolvents' transactions is detailed in the judgment of the court.

McCulloch and *Lang* for the opposing creditors.

Farran for the insolvents.

The hearing took place before GIBBS, J., sitting as Commissioner in Insolvency, on the 6th of February and 13th of March 1871.

Cur. adv. vult.

March 27. GIBBS, J. :—These insolvents obtained their discharge under the 47th section of the Act (11 & 12 Vict., c. 12) on the 17th of October 1870, and on the 21st of November

1870 applied for a final discharge in the nature of a certificate, under the 60th section of the Act. A rule *nisi* was granted, and notices in accordance with the rule were duly published. On the day for making the rule absolute, I permitted grounds of opposition, which had been tendered by Messrs. Finlay, Scott, and Co., a day beyond the proper time, to be filed, and the hearing of the said opposition was commenced on the 6th of February, and was concluded on the 13th of March. Mr. McCulloch and Mr. Lang, being counsel for the opposing creditors, and Mr. Farran, being counsel for the insolvents, having been heard, I took time to consider my judgment.

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As far as the records of this court show, this is the first occasion on which an application for final discharge has been opposed; and the following questions have been raised for the consideration of the Court:—1st, whether Messrs. Finlay, Scott, and Co., not having filed grounds of opposition to the discharge of the insolvents under Sec. 47, can be allowed to oppose a final discharge under Sec. 60; 2nd, whether the grounds of opposition against an order under Sec. 60 should be allowed to include matters which might have been put forward as grounds for opposing the personal discharge under Sec. 47, or whether they should be confined to matters either not known at that time or which have occurred since; 3rd, should the above two questions be decided in favour of the opposing creditors, then, whether the facts given in evidence would justify the Court in refusing the final discharge of the insolvents.

In considering the first and second questions, I would premise that the procedure laid down by the Indian Insolvency Act differs from that which was in operation in England at the time when it was passed. There were then two distinct tribunals—one the Insolvent Debtors' Court, as constituted by the 5th & 6th Vict., c. 116, amended by 7 & 8 Vict., c. 96, and 10 & 11 Vict., c. 102; and the other the Bankruptcy Court, as constituted under the 5th & 6 Vict., c. 132; and it was not till the year 1861, under the provisions of 24 & 25 Vict., c. 134, that the business of the two courts was consolidated into one: whereas we have had in India,

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at all events since 1847, one law for both bankrupts and insolvents, and under this a trader who has obtained an order for a personal discharge under Sec. 47, which has only the effect of "protecting his person from arrest in respect of all demands inserted in his schedule or established in the court, can, under Sec. 60, obtain a final discharge, in the nature of a certificate, which order shall extend to and discharge the insolvent personally, and also his after-acquired property, from all demands which would be discharged by a certificate under the bankrupt laws." In considering, therefore, the course that I should adopt with regard to the first and second questions, I think I must be guided by the procedure followed by the Insolvency and Bankruptcy Courts at home previous to the late changes which have been introduced within the last few years. And in so doing I shall consider the order of discharge under Sec. 47 of the Act for India equivalent to the order given after the first examination under the English Act (7 & 8 Vict., c. 96, s. 24), and the final order of discharge under Sec. 60 of the Act for India equivalent to the final order under the English Act, and also to the order for discharge granted by the Court of Bankruptcy.

In the case *re Lane*, quoted in Macrae's Practice, page 411, an objection was taken that the creditor who appeared to oppose did so for the first time on the day for the final order, and so could not be heard, as his opposition should have been made on the day of first hearing; but Mr. Commissioner Stephen held that the grounds of opposition ought to be heard, and this seems to have been the established practice of the Insolvent Court. It is true that the wording of the English Act gave very great discretionary powers to the Commissioners, and it may be said that under the Act for India nothing is said as to the course to be pursued under Sec. 60, as to what opposition, if any, should be allowed; but doubtless, considering the provisions made for serving notice of the rule *nisi* having been granted to every creditor, it would be absurd to hold that such notice did not contemplate an opposition by the creditors if they

were so inclined, especially as the courses the court may adopt are similar to those under Sec. 47. Again, considering the great difference between the effect of an order under Sec. 47 and an order under Sec. 60—the one merely relieving the debtor from the dread of personal arrest for any of the debts mentioned in his schedule or established in the court, but leaving his future property liable to be taken for the benefit of his creditors; and the other releasing him and his property from all liability, and enabling him to commence business again, absolved from all the responsibilities of his previous debts (see *ex parte Parbury* [a])—I say that it would appear but reasonable to allow a creditor, who might not care to oppose in the first instance, to come forward and show grounds why the insolvents should not be permitted to recommence business with a clean bill of health: so that, following what I believe to have been the practice at home in the Insolvent Debtors' Court and Bankruptcy Court, I think, on the general question, that a creditor may be allowed to come and oppose for the first time when application is made for a final discharge.

In the present case there are peculiar circumstances which induced me to overlook the irregularity, and permit the grounds of opposition tendered after date to be filed, which would also, I think, have been sufficient, had the practice been otherwise, to induce me to allow Messrs. Finlay, Scott, and Co. to oppose the present application. These circumstances are that the application for discharge under Sec. 47 was opposed by Nathu Lakhmidás, one of the creditors, who called in support of his opposition the resident partner of Messrs. Finlay, Scott, and Co., Mr. Reid. This gentleman attended the court on several days when the case was likely to be called on, and, as he has explained in his evidence, thought that he should as a witness be enabled to bring his own grounds of opposition to the notice of the court. On the morning of the day on which the case would have come on for hearing, the opposition was suddenly withdrawn, without Mr. Reid knowing anything about it,

(a) 30 L. J. Ch. 513.

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and the insolvents obtained their discharge as non-opposed debtors from my brother Green, who sat as Commissioner on that occasion; and although Mr. Reid was mistaken in supposing that as a witness he could put forward his own grounds of opposition, still, knowing as I do, from my experience in this court, that oppositions, as a rule, are only withdrawn when the insolvent has satisfied the opposing creditor to a greater or less extent, the price of which depends on the nature of the opposition, I should be loth, unless under very exceptional circumstances, to prevent, through a technicality, any alleged fraudulent conduct of the insolvents being passed over without inquiry. The words of Lord Justice Knight-Bruce in *ex parte Selby* (b) point out the duty of the court. When considering the grant of the final order, he says: "A certificate under a bankruptcy is not a matter of right, but a matter of discretion—a discretion to be exercised on judicial principles; but the case of a certificate is one in which those judicial principles involve the duty of attending to the public interest and claims of society at least as much as in any other class of cases coming under the consideration of this court." Similar sentiments have been expressed in *ex parte Dobson* (c) and in other cases; and I, therefore, think, in considering whether the insolvents should, or should not, have a final discharge, all the circumstances of their mercantile career may be taken into consideration; and I am, therefore, of opinion that both the first and second questions should be decided in favour of the opposing creditors.

This brings me to the consideration of the third question, namely, whether or not the insolvents are entitled to their final discharge. The 60th section provides that upon the further hearing of the petition it shall "be lawful for the court to make the rule *nisi* absolute, or to dismiss such petition, or to adjourn the further hearing thereof, or to make such order therein as shall be just." Now, as I consider the entire conduct of the petitioners, as far as it is established by evidence, is open to the consideration of the Court, and that

(b) 6 De G. M. & G. 783, 789.

(c) *Ibid.* 781.

in arriving at a conclusion it should be guided not only by the principles of law, but also by those of public policy, and with a due regard to the claims and interests of the mercantile community, I am bound not only most carefully to consider the facts proved in evidence, but also whether the conduct of the petitioners has been such as would entitle them to be permitted to commence business again in this city. Mr. Reid has given his evidence in the fairest manner; he has made no attempt to palliate the line of conduct pursued by his firm with regard to the insolvents; he has stated clearly and with much detail every transaction: and I may, therefore, I think, fairly consider that from his evidence, both in chief and cross examination, the court has before it a very trustworthy statement of the insolvents' method of carrying on business. I am, however, unable to say the same of the evidence given by the insolvents, who not only fenced with the questions put to them, but prevaricated considerably in their statements of what actually occurred.

Now I think the following facts are clearly established. The insolvents were the brothers of the late Mánikji Shápurji Káká, who, in partnership with Karsandás Mádhav-dás, was the guarantee-broker of Messrs. Finlay, Scott, & Co. They had for some years been carrying on business as cotton merchants, shipping cotton to England and taking advances from different houses on the shipments made. This business resulted, in 1867, in the insolvents being largely indebted to their creditors generally, and to Messrs. Finlay, Scott, & Co. in particular. The debt to this firm was between 75,000 and 1,00,000 rupees, partly to secure which they mortgaged immoveable property to the firm which was then said to be valued at 50,000 rupees, but which would not now fetch more than 20,000 rupees. It appears that in January 1869 Mr. Reid had a conversation with the insolvents with regard to clearing off this debt, and it was arranged that they should recommence business, which they had stopped since 1867, and ship cotton, and take up advances from Messrs. Finlay, Scott, & Co. to be covered by shipping-notes.

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These transactions were not guaranteed by that firm's broker, who, from being aware of the state of the insolvents' affairs, considered it too great a risk to guarantee the advances. The result of these transactions was, on the whole, unsatisfactory, and allegations have been made that the weight of the bales shipped, which should have been that of ordinary Bombay bales, was less; but that the insolvents were aware of this fact I do not consider established. They themselves throw the blame upon their *mukádam*; and Mr. Reid seems inclined, from the confidence he had in the insolvents, not to lay the blame upon them.

It appears that towards the end of 1869, in spite of all these risks which had been undertaken, the position of the insolvents with regard to the firm of Messrs. Finlay, Scott, & Co. was about the same as it had been in 1867—in other words, they still owed them a large sum of money, about a lách of rupees. In November 1869 a conversation is stated to have taken place between the insolvents and Mr. Maxwell, who was the then resident member of the firm, and, as it occurred during Mr. Reid's absence at home, the only direct evidence of what then took place is from the statements of the insolvents; and although each prevaricated, and contradicted both himself and the other, there is no doubt but that it resulted in a special loan from Messrs. Finlay Scott, & Co. of Rs. 15,000 to the insolvents, specially guaranteed by Mánikji Shápurji Káká himself, which was to be covered in the usual manner by shipping-notes. On various pretexts the delivery of the shipping-notes was put off from time to time, and in January, on Mr. Reid's return from England, they promised that they would procure the necessary cotton, and also agreed that they would abstain from all further business without the permission of Mr. Reid; but they failed to produce the notes, and the general break-up of credit owing to the discovery of the *Aurora* frauds rendered the fulfilment of their promise impossible, and they have been unable to this day to carry out their agreement. Had the case remained in this position, and had there been no other transaction, I think I should have been induced to

consider the matter as one solely between Finlay, Scott, & Co. and the insolvents, and should not have considered it in its effects on public policy or the interests of the mercantile community. But it is further established that about the following March or April the insolvents applied to Messrs. Finlay, Scott, & Co. for an advance on cotton, which was refused ; and their books show that on the 28th of March they took up the sum of Rs. 23,891 from Messrs. Frámji, Sands, & Co. on the security of 200 bales of cotton to be shipped per *Greyhound*, and on the same date about a similar amount, from Messrs. Bamanji, Touche, & Co., on the security of 200 bales to be shipped in the *Aurora*. On the 26th of May an application was made to Messrs. Finlay, Scott, & Co. by one Surji Punji for an advance of Rs. 20,000 on 200 bales of cotton, which, being guaranteed in the usual manner by Mánikji Shápurji Káká, was agreed to. A bill of lading for 200 bales of cotton, purported to have been shipped on board the *Armanilla*, was given, but subsequent investigation led to the discovery that the bill of lading was fraudulent. It appears that this man Surji Punji had, previous to the month of May, taken other advances of a similar nature from Finlay, Scott, & Co., to the amount of about Rs. 47,000, irrespective of the advance in May. Owing to their not completing their engagements, Mr. Reid had a further interview with the insolvents in the end of May or beginning of June, when they produced their books, and he then found that they had the dealings above mentioned with Frámji, Sands, & Co. and Bamanji, Touche, & Co., but he was not aware, until the schedule was filed, that Surji Punji was a partner of the insolvents. I may here state that every means has been taken to procure the attendance of this man, but unsuccessfully.

Now, a consideration of these facts leads me to the conclusion that the insolvents have been in a state of insolvency since 1867 ; that with the hope of retrieving their circumstances they entered into large transactions through Finlay, Scott, & Co. in the year 1869, which led to no beneficial results, but rather, it would appear, placed them in a

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worse position than they were before as regards Messrs. Finlay, Scott, & Co., while it may be fairly presumed that their position with regard to their other creditors was also worse; that in November 1869 one final attempt was made to retrieve their losses, and the special advance specially guaranteed by their brother was taken up upon terms which, supposing the insolvents' account of them to be correct, have never been carried out; that, finding Finlay, Scott, & Co. would make no further advances, they, in combination with their brother, the broker, put forward a Hindú, Surji Punji, whom they have since admitted to have been their partner, for the purpose of getting advances; that this man obtained advances from Messrs. Finlay, Scott, & Co., the re-drafts of which were met by similar advances taken up by the insolvents from Framjee, Sands, & Co. and Bamanji, Touche, and Co., and finally, to assist to discharge these claims and pay the cotton-dealers, an advance on a fraudulent shipping-note* was taken up by Surji from Finlay, Scott, & Co., and which is now entered in the schedule as being due by the insolvents.

Whatever amount of blame may attach to Messrs. Finlay, Scott, & Co. for assisting the insolvents to carry on business after they were hopelessly insolvent, and which, had the question before me been purely one between that firm and the insolvents I might have decided in favour of the latter, I am of opinion that in considering the question of the final discharge of any insolvent I am bound to consider the interests of the mercantile public generally. While, therefore, I cannot approve of the course pursued by Messrs. Finlay, Scott, & Co., I am not called on to state my opinion fully on that point. What I am required to do is to consider the conduct of the insolvents, and whether they have so far misconducted themselves as members of the mercantile community that it is expedient that I should withhold from

* NOTE.—This shipping-note was not given until some time after the money was advanced. The insolvents stated that M. S. Káká, the broker of the opposing creditors, knew that it did not represent cotton actually shipped. M. S. Káká was dead at the date of the hearing.

them, either entirely or for a time, that certificate which alone would enable them to recommence business unembarrassed by their former liabilities. I have already quoted Lord Justice Knight-Bruce's words in the case *in re Selby*. The same learned Judge, in *ex parte Rufford* (d), in observing upon the argument adduced on behalf of the bankrupts that their continuing to trade might have been with the hope of retrieving themselves, says : " I must observe that, even supposing that occasionally to be done by traders who eventually set themselves right in the world again, that is no justification of such conduct" (p. 237). And in the case of *ex parte Heyn* (e) Lord Justice Rolt observes, when commenting on the conduct of a firm carrying on business after they had become not actually insolvent, but only " not strong, if solvent." " What then was the bankrupts' duty under these circumstances? It must be borne in mind that, though their transactions in cotton were within the limits of legitimate commerce, yet that the article was among the most fluctuating in price, and the transactions of the most hazardous nature of any within those limits. The bankrupt was, therefore, called on to exercise the utmost caution and prudence in extending his liabilities ;" and again : " Whatever was subsequently done was not done under any such necessity," i. e., the keeping a large stock of cotton on hand to meet the requirements of the trade, " but solely to take the chance of profit to themselves should there be a rise in the market, with the certainty that the loss resulting from any considerable fall would not fall on themselves, but on their creditors ;" and, in conjunction with Lord Cairns, who agreed with him, confirmed the decision of the Bankruptcy Court, adjourning the discharge for twelve months, six months of which was without protection.

The insolvents' method of carrying on business from 1869 to the time they filed their schedule was, in my opinion, far more blameworthy than was the conduct of Heyn Brothers in the case I have just quoted ; and, considering the disclosures which have been made of late in this High Court

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(d) 2 De G. M. & G. 234. (e) Law Rep. 2 Ch. Ap. 650, 653.

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in its civil, criminal, and insolvency jurisdictions—showing in many instances a painful absence of mercantile morality, and an utter recklessness with regard to the consequences which failure in speculations would ensure—I think I cannot do otherwise than mark with my severe displeasure the conduct of the insolvents in the present case, in hopes—I admit, but slight—that it may act as a warning to others, and at the same time show that to obtain a final discharge in the nature of a certificate is not a matter of course. I adjourn the grant of the certificate under Sec. 60 for a period of eighteen months.

Attorneys for the opposing creditors: *Acland, Prentis, & Bishop.*

Attorneys for the insolvents: *Hearn, Cleveland, & Peile.*

Original Suit No. 394 of 1870.

March 31.

JOHN G. *Petitioner.*

MARY ANNE G. *Respondent.*

Dissolution of Marriage—Adultery of the Petitioner during Marriage—Discretion—Act IV. of 1869, Sec. 14—Indian Divorce Act.

The Courts in India will adopt, as a guide in the exercise of the judicial discretion in granting or refusing a decree of dissolution of marriage given by Sec. 14 of the Indian Divorce Act, the principles laid down in the English decisions with regard to the corresponding section in the English Act (20 & 21 Vict., c. 85, s. 31).

The discretion to be exercised under Sec. 14 of the Indian Divorce Act must be a regulated discretion. The Court cannot grant or withhold a divorce on the mere footing that the petitioner's adultery is more or less pardonable, or that it has been more or less frequent. There must be special circumstances attending the commission of such adultery, or special features placing it in some category capable of distinct statement and recognition, in order that the discretion may be fitly exercised in favour of a petitioner.

THIS was a petition for dissolution of marriage under the Indian Divorce Act (IV. of 1869). The petition (omitting the allegations with reference to the person who had in the first instance been joined as a co-respondent) showed—

That the petitioner was, on the 12th of October 1863, lawfully married to Mary Anne G., then Mary Anne C., spinster, at Puná, in the diocese of Bombay.

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That from his said marriage the petitioner lived and cohabited with his said wife at Puná and at Deesa, and lastly at Puná, within the presidency of Bombay, and that the petitioner and his said wife had issue of their said marriage three children, of whom one son only survived, aged four years and four months.

That during the seven months immediately preceding the 30th day of June 1868 the petitioner was in Abyssinia on field service.

That since the said 30th day of June the said Mary Anne G. had been, and still was (as the petitioner was informed and believed), leading a life of prostitution, and then resided in a house at Puná in a locality which is a common resort of prostitutes.

That no collusion or connivance existed between the petitioner and his said wife for the purpose of obtaining a dissolution of their said marriage, or for any other purpose.

The petition prayed the court to decree a dissolution of the said marriage.

An office copy of the petition, with the summons, was, by Green, J. (who accepted the petition), directed to be served on the respondent and original co-respondent, to whom also notices were respectively given to file written statements.

The petition came on for hearing on the 20th of March 1871 before GREEN, J., when evidence was given of the facts detailed in the petition. The substance of the evidence is set forth in the judgment of the court.

Macpherson for the petitioner.

There was no appearance for the respondent.

Cur. adv. vult.

March 31st. GREEN, J.:—This is a petition, under Act IV of 1869 (the Indian Divorce Act), by a husband praying for dissolution of marriage with his wife. The petitioner alleges

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that he was married to the respondent within this presidency in the month of October 1863, and after such marriage cohabited with her, also within this presidency, and has had issue of such marriage—three children, of whom one has survived; that during the seven months immediately preceding the 30th of June 1868 he was absent from Bombay on military service; that since the 30th of June 1868 the respondent has been leading a life of prostitution, and now resides in a house in a locality which is the common resort of prostitutes; and that no collusion or connivance exists between him, the petitioner, and his said wife for the purpose of obtaining a dissolution of the said marriage, or for any other purpose.

The petition as originally filed (which was on the 18th of June 1870) named a third person as co-respondent, with whom it was alleged the respondent had, during the said period of seven months immediately preceding the 30th of June 1868, committed adultery. By an order made in chambers by Mr. Justice Bayley on the 14th of January 1871, with the consent of the co-respondent (who had appeared to the petition), it was ordered that the petition be amended by striking out the name of the co-respondent, with such portions of the petition as related to him or to his acts. The application for such order for the amendment of the petition was supported by an affidavit of the petitioner, that the persons from whom he derived the information on the ground of which the allegations in his petition affecting the co-respondent were made were not prepared to repeat on oath the statements they had made to the petitioner, and that the petitioner knew of no person with whom the adultery of the respondent had been committed, though he was prepared to prove the charges of prostitution and adultery against the respondent by himself, the petitioner, and other witnesses. The order was made under Sec. 11 of the Act, which provides that when a petition is presented by the husband the alleged adulterer is to be made a co-respondent, unless the petitioner is excused from so doing by the court on (amongst others) the following

grounds:—that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed.

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At the hearing, which took place on the 20th of March instant, the respondent did not appear, and was not represented by counsel or otherwise. The marriage having been proved, the petitioner offered himself as a witness in support of the allegations of the petition, and produced certain letters written to him by the respondent in the course of last year. The petitioner deposes, and I see no reason to doubt his evidence, that on the day after his return, on the 30th of June 1868, from his absence on military service, the respondent, in answer to his inquiries, made certain statements which in my opinion constitute an admission that during such absence she had committed adultery with persons not named. The five letters of the respondent to the petitioner written during the course of the last year must, I think, be construed as an admission on her part that she had been unfaithful to her husband, and in them she asks his forgiveness and to be allowed to return to him. The foregoing evidence, however, though going to prove that before the 30th of June 1868 the respondent had been guilty of adultery, does not establish the allegation in the petition as amended, that since that date the respondent has been leading a life of prostitution. The evidence on which the latter allegation is sought to be proved is the evidence of the petitioner, and of an officer of the district court of the place where the respondent has been residing, and by whom the summons and petition were served on her. It may be observed that the petitioner would not in England till recently* have been a competent witness to prove his wife's adultery; but by Sec. 51 of the Indian Act "any party may offer himself or herself as a witness, and shall be examined and may be cross-examined and re-examined like any other witness." These two witnesses, however, the petitioner and the officer of the district court, depose that for some period (and which as to part of it must, I think, be taken to have preceded in

* See 32 & 33 Vict., c. 68, and 33 & 34 Vict., c. 49.

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time the institution of the suit, though as to this point the evidence of the petitioner is not by any means clear) the respondent has been living in a row or cluster of houses almost all occupied by prostitutes or kept women. If it had been necessary to decide the case on the question whether the respondent had been proved, according to the allegation of the petition, to have been leading a life of prostitution during the period between the 30th of June 1868 and the date of filing the petition, namely, the 18th day of June 1870, I should have felt great difficulty in coming to the conclusion that that allegation had been sufficiently established by the foregoing evidence. I cannot help believing that more direct and satisfactory evidence of the allegation might have been obtained than has been given, and in matters of so important a nature as a dissolution of marriage it is surely not an unreasonable requisition that persons seeking such relief must prove the facts on which their right to a decree is founded, by the best evidence which the circumstances of the case will admit of. I am of opinion, however, that at any rate enough has been established in evidence by the petitioner as would warrant him in asking the court, under Sec. 54, to adjourn the hearing and take further evidence.

But the chief difficulty I have felt is whether the petitioner is, as the phrase is, *rectus in curiâ*, or whether he has not by his conduct debarred himself from obtaining from the court a dissolution of his marriage with the respondent? By virtue of one of the provisos in Sec. 14 of the Act, the court shall not be bound to pronounce a decree dissolving a marriage on the ground of the adultery of the respondent, if it finds that the petitioner has during the marriage been guilty of adultery. In the present case the petitioner admitted, in answer to a question put by the court, that he had committed adultery since he had separated himself from the respondent, but added—with the intention, I suppose of excusing or palliating his act—that it was “over two years after turning her” (the respondent) “away.” I should not have thought it proper for the Court, of its own motion, to put such a question, but having regard to certain allegations in letters of the

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suits for divorce *a mensâ et thoro*.” Now it was well settled in the Ecclesiastical Court that, as a general rule, a divorce *a mensâ et thoro* on the ground of adultery would not be granted where the party suing had been guilty of a like violation of the marriage vow. As Lord Stowell says in *Beeby v. Beeby* (b): “But a plea in bar has been given—a plea of recrimination or *compensatio criminum*—a set-off of equal guilt on the part of the husband. The doctrine that this, if proved, is a valid plea in bar has its foundation in reason and propriety; it would be hard if a man could complain of the breach of a contract which he has violated, if he could complain of an injury when he is open to a charge of the same nature.” It was argued that the offence of the husband had been condoned by the wife, and that such condonation prevented such offence from being effectually recriminated. As Lord Stowell did not consider that there had been condonation, it was not necessary to decide the question; but he rather indicates his opinion that even had there been condonation of the husband’s offence, the fact of such offence would have prevented him from being *rectus in curiâ* so as to be entitled to a sentence of divorce. In *Anichini v. Anichini* (c), however, Dr. Lushington considered the point as not decided by Lord Stowell, and said that he could not go the length of saying that the adultery of the husband, followed by condonation, would debar him from a remedy against his wife under any circumstances which could be supposed. The effect of Dr. Lushington’s decision is stated thus by Sir Cresswell Cresswell in the case of *Goode v. Goode and Hamson*, above cited: “I apprehend, therefore, that the learned Judge did not mean to decide that condonation was a complete legal answer to the plea imputing adultery to the husband, but that in such cases the question is one to be dealt with by the Judge according to his discretion, taking into consideration the peculiar circumstances of each case.” In the case before the court this question of condonation does not arise, as it is distinctly in evidence that conjugal cohabitation has never been resumed or continued

(b) 1 Hagg. Ec. Rep. 790.

(c) 2 Curt. 210.

(and this alone, under Sec. 14 of the Indian Act, amounts to condonation of adultery) between the parties to the suit since the 30th of June 1868. The cases cited are, however, pertinent as illustrations of the strictness with which the principle has been maintained that relief is not given to one who is not *rectus in curiâ*, or, as it is sometimes expressed, does not come to the court with clean hands.

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Among the cases in which the English Divorce Court has been called on to exercise the judicial discretion vested in it by Sec. 31 of the English Act (which is almost word for word identical with Sec. 14 of the Indian Act) are the following:—*Pearman v. Pearman* (*d*), *Lautour v. Lautour and Weston* (*e*), and *Morgan v. Morgan and Porter* (*f*). In *Pearman v. Pearman*, the jury having found that the wife (the respondent) had been guilty of adultery, and the husband (the petitioner) of cruelty towards his wife, the court considered that the cruelty of the petitioner (which is one of the cases mentioned in Sec. 31 in which the court may refrain from pronouncing a decree of dissolution of the marriage), not having caused the misconduct of the wife, but rather having been itself caused by her drunken habits, was not a ground for refusing the relief sought. However, in the only case which I am aware of in which Sec. 14 of the Indian Divorce Act has been considered by one of the High Courts of India, namely, *Gordon v. Gordon and Saran* (*g*), it appears to have been held that the court has discretion to refuse a decree for divorce where the petitioner has been guilty of cruelty, although the cruelty may have been condoned.

In *Lautour v. Lautour and Weston*, the petitioner had in 1838 obtained a decree from the Ecclesiastical Court of divorce *a mensâ et thoro* on the ground of the adultery of his wife, the respondent. In April 1859 he filed a petition in the Divorce Court for dissolution of his marriage, and on the 18th of April 1861 a decree *nisi* for dissolution of the marriage was pronounced. On the 6th of June 1861 Her

(*d*) 1 Sw. & Tr. 601. (*e*) 2 *Ibid.* 521. (*f*) L. Rep. I. Pr. & D. 644.

(*g*) 3 Beng. L. Rep., O. C. J. 136.

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Majesty's proctor intervened, and pleaded (amongst other things) that divers material facts respecting the conduct of the petitioner and respondent had not been brought before the court, and that at the time of presenting his petition, and for many years previous, the petitioner had been living in adultery. The adultery so pleaded appears to have been continuous and habitual, but to have been subsequent in time to the adultery and elopement of the wife. The truth of the matter pleaded was not controverted. The Judge Ordinary says : "I am asked to put a construction on Sec. 31 of the statute, and to say by what rule I am to be guided in the exercise of the discretionary power given me by that section. The only rule that I can give is that I will form a judgment, according to the best of my ability, of the circumstances of each case that is brought before me, endeavouring, so far as I can, to act upon the principles which have been recognised in the Ecclesiastical Court, and which have guided that court in former times when it decided questions of this sort." With reference to the argument urged on behalf of the petitioner, that his adultery was subsequent to that of his wife, and that it was only after obtaining a divorce *a mensâ et thoro* from her that he formed the connection with the other woman, with whom he had lived faithfully, and by whom he had had issue, the Judge Ordinary, after stating that he did not entertain a moment's doubt that the petitioner was not to be deemed a person for whose benefit the Act was passed, observes as follows:—"I presume the Legislature introduced the clause giving a discretionary power to the court in order to meet the case of some temporary lapse from purity of conduct on the part of a married man which might have happened years before, and might have been, as Dr. Lushington expressed it, comparatively venial." And again: "I cannot say, sitting in this seat, that a man is licensed to live in adultery with another woman because his wife has deserted him." The decree *nisi* was reversed, and the petition dismissed, with costs of the Queen's proctor intervening.

In *Morgan v. Morgan and Porter*, the petitioner (the hus-

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to be the refuge of vagueness in decision, and the harbour of half-formed thought." He refused to grant a decree, considering that the mere lapse of time (about twelve years) since the occurrence of the petitioner's adultery was not enough to justify the exercise of the court's discretion in his favour.

Now in the present case I am willing to believe that the petitioner was not aware of the legal bearing of the fact of his own adultery, and I cannot suppose it was ever communicated by him to his legal advisers, or that they were aware of it till it was admitted by him in answer to a question by the court. The concealment of such a material fact, bearing on the question of the exercise of the court's discretionary jurisdiction, would, in my opinion, if intentional and conscious, have in itself gone far to deter the court from granting the relief prayed. I cannot, however, discover any ground for regarding this legal ignorance of the petitioner—supposing it to have existed—nor the fact (if true) that only one act of adultery has been committed by the petitioner, nor the fact that it took place after his separation from the respondent, as being such "special circumstances attending the adultery, or special features placing it in some category capable of distinct statement and recognition," as to make the case a proper one for granting the relief prayed. In *Lautour v. Lautour and Weston* the petitioner's adultery was committed after his wife had committed adultery and had eloped from him, and indeed after he had obtained a decree of divorce *Lamensâ et thoro* from his wife on the ground of her adultery, and yet the court held that he had by his own conduct prevented the court from exercising its discretion in his favour. Except in this respect, that in the present case the adultery of the petitioner appears to have been occasional or perhaps singular, whereas in *Lautour v. Lautour* it had been continuous and habitual, I do not see any distinction between the two cases. It would be impossible to lay down any satisfactory principle of decision derived from a consideration of the greater or less number of acts of adultery committed by the petitioner as to say that one, three, or five acts should not bar the remedy, but that ten, fifteen, or twenty should.

Feeling as I do that to grant a decree of dissolution in the present case would be to go beyond what has been done in any case that I have been able to find or am aware of, I must refuse to make the decree prayed, and dismiss the petition. I think I ought, in conclusion, to express my obligation to the learned counsel for the petitioner (who did all that the facts of the case allowed in support of his client's cause) for the assistance he has afforded to the Court in the consideration of the present case.

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Attorney for the petitioner : *J. Cleary.*

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PIRBHA'I KHAMJI v. THE BOMBAY, BARODA, AND CENTRAL
INDIA RAILWAY COMPANY.

April 1.

Removal of Cause from Small Cause Court—Certiorari—Reasons for Removal—Purposes of Justice—Inability of Small Cause Court to issue Commission—Superintendence of Small Cause Court by High Court—Act IX. of 1850, Sec. 54—Letters Patent of High Court, Cl. 13.

The Bombay Court of Small Causes is subject to the superintendence of the High Court within the meaning of Cl. 13 of the Letters Patent of the High Court, and the latter has, therefore, power, for purposes of justice, to remove a case from the Small Cause Court, and itself to try and determine such case.

The inability of the Small Cause Court to issue a commission to examine for the defence witnesses residing outside its jurisdiction, though not in general, may under peculiar circumstances be a good ground for granting an order to remove a case from the Small Cause Court into the High Court.

Terms upon which such order will be granted.

ON the 16th of March 1871 *McCulloch* moved before GREEN, J., for a rule *nisi* for a writ of *certiorari*, or for an order under Cl. 13 of the Amended Letters Patent of the High Court (1865) calling upon Purbhai Khamji to show cause why the proceedings in the Court of Small Causes of Bombay in Suit No. 4350 of 1871 should not be removed into the High Court.

The rule was moved for upon the affidavit of Charles Albert Winter, a partner in the firm of Messrs. Keir, Prescott, and Winter. The affidavit stated that on the 24th of August 1870 a suit, No. 18,758, was instituted in the Court of Small

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 PIRBHÁI KHIMJI I. Railway Company, in which the plaintiff sought to recover
 v. Rs. 766-11-4 from the defendants, on account of $18\frac{1}{4}$ *mans*
 B. B. & C. I. $2\frac{3}{4}$ *seers* of fishmaws short in weight out of 27 bags, and
 RAIL. CO. $1\frac{3}{4}$ *mans* short out of 19 bags of sharkfins in a consignment of
 46 bags, delivered to the defendants by the plaintiff's agent
 at Damaun, to be conveyed to Bombay and there delivered
 to the plaintiff, and on account of the fare paid on the quan-
 tity short delivered. The summons was made returnable
 on the 16th of November 1870. By consent, the hearing
 of the case was postponed more than once, and ultimately
 came on for hearing on the 22nd of December 1870, before
 Mr. Mánikji Kharsetji, then acting as First Judge.

The defendants were advised that certain officers of the company employed upcountry, one Hormasji Bezanji, an inspector of customs, and one Bhímabhái Vassanji, a weighing clerk in Government employment at Kuntá, a customs station between Damaun and British territory, were material witnesses for the defence, but that the Small Cause Court had no power to compel their attendance, as they lived beyond its jurisdiction.

In order to facilitate the trial of the *sùit*, Messrs. Keir, Prescott, and Winter wrote to the Deputy Commissioner of Customs at Súrat, requesting him to allow Hormasji and Bhímabhái to come to Bombay, and undertook to pay their expenses, and also sent their clerk to Hormasji and Bhímabhái to induce them to come to give evidence at the trial. Hormasji and Bhímabhái came to Bombay. The case came on for hearing on the 22nd of December 1870, when the plaintiff's witnesses were examined, as also were Hormasji and Bhímabhái for the defence, and the case was then adjourned. On the 9th of February 1871 the case was again called on, when the plaintiff appeared in person, and Mr. Keir appeared for the defendants. The plaintiff applied for an adjournment, on the ground that his attorney was engaged. This application was refused, and the plaintiff thereupon elected to be nonsuited, and the Judge ordered a nonsuit to be entered, though Mr. Keir objected that he would be unable

to obtain the attendance of the witnesses again from Kuntá. Pirbhái Khimji then filed another suit, No. 4350 of 1871 (the present suit), against the defendants, for the same cause of action as the former. There was an allegation that Hormasji and Bhímabhái were material witnesses for the defence; that they were beyond the jurisdiction of the Small Cause Court, and that they could not by the process of that court be compelled to attend to give evidence in Bombay, nor could they be examined under a commission.

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McCulloch, in moving for the rule, contended that there would be a failure of justice if the rule he asked for were not granted; that though this was not a case embraced by Sec. 54 of Act IX. of 1850, yet the provisions of that section were in effect enlarged by Cl. 13 of the Letters Patent, which were passed in pursuance of, and were, therefore, equivalent in operation to, an Act of Parliament (24 & 25 Vict., c. 104); that the Court of Small Causes in Bombay was subject to the superintendence of the High Court within the meaning of Cl. 13 of the Letters Patent, and that for "purposes of justice" this was a case in which the High Court would exercise the discretion confided to it under that clause. He relied upon *Pillans v. The P. & O. S. N. Co.* (a) as a case in point, and cited *Symons v. Dimsdale* (b); Archbold, Q. B. Practice, pp. 1240-1248 (9th ed.).

The Court took time to consider whether it had power to grant the rule, and on the 18th of March 1870 granted a rule *nisi*, stating the following reasons for so doing:—

GREEN, J. (after stating the facts as they appeared from the affidavit of Mr. Winter, proceeded):—There is no doubt that the late Supreme Court of Bombay had power by *certiorari* to remove suits depending in the Court of Small Causes in the cases specified in Sec. 54 of Act IX. of 1850 (the Small Causes Courts' Act). The conditions of such removal were that the debt or damage or value of the property claimed should exceed Rs. 100, and that the leave of a Judge of the Supreme Court should be obtained, on proof to

(a) I. Ind Jur., O. S. 68.

(b) 2 Exch. 533.

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his satisfaction that some question of law or equity was likely to arise in the cause which, by reason either of its difficulty, novelty, or general importance, or of some erroneous course of decision on the same point in the Court of Small Causes, might appear to him fit to be tried in the Supreme Court, and upon such terms as to payment of costs, giving security for debt or costs, or otherwise, as he might think fit. By the operation of Sec. 11 of the 24 & 25 Vict., c. 104 (the Act for establishing High Courts of Judicature in India), the power of removing causes from the Small Cause Court given to the late Supreme Court by Sec. 54 of Act IX. of 1850 is continued to the High Court, and the case, cited by counsel, of *Pillans v. The P. & O. S. N. Co.* (*ubi supra*), is a precedent for the exercise by the High Court of the power of removing by *certiorari* a suit from the Small Cause Court, given to the late Supreme Court by Sec. 54 of Act IX. of 1850, in a case coming within the conditions prescribed by that section.

I mention Sec. 54 of Act IX. of 1850 (which, however, it will be material to consider for another purpose) at the outset to explain why I treat the present application as one not for a writ of *certiorari* under the practice of the late Supreme Court, but for an order under Sec. 13 of the Letters Patent of the High Court. The circumstances of the case, as they appear from Mr. Winter's affidavit, do not bring the application within Sec. 54 of Act IX. of 1850. It does not appear to me that any such question of law or equity as is there mentioned is likely to arise, and indeed that ground for the present application is not suggested; but the ground of the application is that certain persons are material witnesses for the Company at the hearing of the cause, and that the Small Cause Court has no jurisdiction to compel their attendance, or procure the taking of their evidence on commission. These circumstances, it is contended, make the case a proper one for the exercise of the power conferred on the High Court by Sec. 13 of the Letters Patent, by which it is ordained: "That the said High Court of Judicature at Bombay shall have power to remove, and to try and

determine as a Court of Extraordinary Original Jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Presidency of Bombay, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court."

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Now, I do not feel any difficulty in coming to the conclusion that the removal of this cause is proper for purposes of justice, having regard to the fact that the defendants have already, at considerable expense and trouble, procured the attendance and examination in Bombay of the two witnesses in question; that such attendance and examination was rendered of no avail by the application of the plaintiff for a nonsuit having been granted by the Judge; and that the defendants, the Company, are unable again to procure the attendance of those witnesses. In my opinion, the First Judge of the Small Cause Court (if it be true that the difficulty of again procuring the attendance of the defendants' witnesses was duly represented to him) should not, in the circumstances of the case, have exercised his power to nonsuit the plaintiff, except on the terms of the plaintiff consenting that the evidence already taken on behalf of the defendants should be used in any future suit which the plaintiff might institute for the same cause of action.

The difficulty I have felt with regard to the application of the 13th clause of the Letters Patent has not, however been on the question whether the removal of the suit is proper for purposes of justice, but on this, whether the Court of Small Causes at Bombay can be said to be "subject to the superintendence" of the High Court. The Charter Act and the Charter itself do not afford much, or indeed any, assistance on this point, as Sec. 15 of the Act enacts that "each of the High Courts established under this Act shall have superintendence over all courts which may be subject to its appellate jurisdiction," &c.; and Cl. 16 of the Letters Patent ordains "that the High Court of Judicature at Bombay shall be a

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court of appeal from the Civil Courts of the Presidency of Bombay, and from all other courts subject to its superintendence," &c.: so that, taking the Act and Letters Patent together, I find that the High Court has superintendence where it has appellate jurisdiction, and has appellate jurisdiction where it has superintendence. Now, there can be little doubt that the High Court is not in any proper sense a court of appeal for the Small Cause Court. The Judges of that court have indeed power, in their discretion, under Sec. 55 of Act IX. of 1850, and under Sec. 7 of Act XXVI. of 1864 are bound, in cases falling within such last-mentioned section, to reserve questions of law or equity as to which they entertain any doubts, or which they are requested by either party to reserve for the opinion of the High Court. But neither this power or obligation to reserve questions for the High Court, nor the power of the High Court to remove causes under the 54th section, gives the High Court appellate jurisdiction, properly so called, over the Small Cause Court. However, Sec. 15 of the Charter Act does not, in my opinion, limit the superintendence of the High Court to the courts which may be subject to its appellate jurisdiction; it only says that over such courts the High Court shall have superintendence, not that it shall have superintendence over those courts which are subject to its appellate jurisdiction, and over no others. This Sec. (15) of the Charter Act was discussed in the matter of John Thomson, where it was held that the High Court of Bengal has general superintendence over the Court of the Recorder of Moulmein, so as to have power to set aside an order of the Recorder directing the withdrawal of a license to practise as an advocate in the Small Cause Courts at Rangoon and Moulmein (c). That case, however, does not exactly touch the question in the present case, as by Act XXI. of 1863 (which established the Recorder's Court at Moulmein) a certain appellate jurisdiction, though a limited one, over such court is given to the High Court of Bengal; and it was held that the existence of such appellate jurisdiction, though limited, brought the court in question under

(c) 6 Beng. Law Rep., 180.

the superintendence of that High Court within Sec. 15 of the Charter Act.

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In the present case I am of opinion that the Bombay Court of Small Causes must be considered to be subject to the superintendence of the High Court at Bombay, for the purpose of Sec. 13 of the Letters Patent, for the following reasons:—Subject to the conditions prescribed in Sec. 54 of Act IX. of 1850, the High Court has authority, under that section, to remove causes from the Small Cause Court, and itself to try and determine them. By Sec. 41 of the same Act, any general rules for regulating the practice and proceedings of the Small Cause Court made and issued by the Judges of that court, are to be sent to the High Court, for approval of the Judges of that court, though they are to have force until disapproved. Then there is the power of this court (which has been from time to time exercised) to prohibit the Bombay Court of Small Causes from proceeding where it is acting without jurisdiction or in excess of its jurisdiction, which is a power of the same kind as that exercised over the County Courts in England by the Superior Courts of Common Law at Westminster by means of a writ of prohibition. Then there is the power of reserving questions of law or equity for the opinion of the High Court, and the obligation to do so in cases above the value of Rs. 500, on the application of either of the parties, to which I have already adverted. The decision of the High Court on such reserved question is binding on the Small Cause Court, and Mr. Justice Phear, in the above-cited case of John Thomson, it is to be noticed, speaks of such a power of reference to the opinion of the High Court as a “modified form of appeal.”

For the above reasons I am of opinion that the Bombay Court of Small Causes, though not subject in all respects, or perhaps generally, to the superintendence of the High Court, nor, strictly speaking, subject to its appellate jurisdiction at all, is so far subject to its superintendence as to give the latter court, under Sec. 13 of the Letters Patent, power to remove, and try and determine, any suit pending in the former

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court, when the High Court, for purposes of justice, shall think proper to do so.

The order which I consider proper to be made on this application is as follows :—That an order be issued, under the seal of this court, addressed to the Judges of the Bombay Court of Small Causes, that all proceedings in Suit No. 4350 of 1871, instituted in the said court by Pirbhái Khimji against the Bombay, Baroda, and Central India Railway Company, be removed from the said Court of Small Causes to this court, and commanding the said Judges to send and certify to this court the said proceedings, with all things touching the same, as fully and entirely as the same remain in their court before them, that this court may further cause to be done thereupon what of right this court shall see fit to be done, unless cause be shown to the contrary, by or on behalf of the said Judges, or the said Pirbhái Khimji, within four days after service of this order on the Clerk of the said Bombay Court of Small Causes, and on the said Pirbhái Khimji, respectively. And it is further ordered that in the mean time, and until the further order of this court, the said Pirbhái Khimji be restrained by injunction from further proceeding with the said suit, No. 4350 of 1871. And it is hereby recorded, in pursuance of Cl. 13 of the Letters Patent, that the reason for making this order is the consideration of the inability of the said Bombay Court of Small Causes to enforce the attendance or procure the evidence of witnesses material and necessary for the defence of the said suit.

Anstey showed cause against the above rule on the 28th of March 1871. He contended that the Small Cause Court of Bombay was not subject to the superintendence of the High Court, though it was inferior to it ; that the defendants had mistaken their remedy, and ought to have filed an injunction suit, no case having been made out for a writ of *certiorari* ; that the precedent afforded by this case would be a most dangerous one, and that, on the principle of "*expressio unius alterius exclusio*," the power of the High Court

to interfere was limited to the cases provided for in Act IX. of 1850, Sec. 54.

McCulloch in reply.

Cur. adv. vult.

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April 1. GREEN, J.:—In this case an order, dated the 18th of March, was made by this court, exercising its extraordinary original jurisdiction, on the application of the defendants, the Baroda Railway Company, to remove the above suit from the Court of Small Causes at Bombay to this court, unless cause was shown to the contrary. On Tuesday the 28th of March, Mr. Anstey was instructed, on behalf of the plaintiff in the Small Cause Court, to show cause. The objection chiefly urged by the learned counsel against the order was, that the High Court has jurisdiction to remove suits from the Bombay Court of Small Causes only in the cases provided for by Sec. 54 of Act IX. of 1850 (having regard also to the extended jurisdiction given by Act XXVI. of 1864), and not for the cause alleged in the present case, namely, the inability of the Court of Small Causes to procure the attendance of certain witnesses necessary to support the defence.

I quite agree that the question whether the Court of Small Causes at Bombay can be said, under Sec. 13 of the Letters Patent, to be subject to the superintendence of the High Court, is not so clear as in the case of the Courts of Small Causes in the Mofussil, constituted or regulated by Act XI. of 1865, and of the courts in the Mofussil, which are subject to the appellate jurisdiction of this court. By Sec. 4 of Act XI. of 1865, the Courts of Small Causes in the Mofussil are expressly made "subject to the general control and orders of the High Court." But, for the reasons stated in the judgment which I gave on the 18th of March last, I adhere to the opinion then expressed, that the Bombay Court of Small Causes is so far subject to the superintendence of the High Court at Bombay as to give the latter court, under Sec. 13 of the Letters Patent, power to remove, and try and determine, any suit pending in the former court when the High Court may think proper to do so for purposes of justice. I feel the weight of the consideration urged by the learned counsel, that

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to remove a cause to the High Court simply because the Small Cause Court has not powers to try such cause as effectually as the High Court has (and the omission to give which powers must be supposed to have been present to the mind of the Legislature in constituting the former court) would be, to a considerable extent, to curtail the benefits of speedy and cheap justice, which was contemplated when the Small Cause Courts were established; and if a case rested there this court ought, I think, to be slow to be induced to exercise the power. But in making the order of the 18th of March I was influenced not only by the consideration that in the suit in question the Small Cause Court could not enforce the attendance of witnesses necessary for the defence, but by the other circumstances stated in Mr. Winter's affidavit, and which are also detailed in my judgment. I think such an order for removal ought to be granted only on the terms of the party seeking to have a case removed paying all costs of his opponent of the proceedings in the Small Cause Court down to the time of removal, and undertaking to abide by any order the High Court may think fit to make with reference to the costs of the cause when in the High Court, and, if necessary, giving security for such costs. The only precedent I am aware of, of an order under Sec. 13 of the Letters Patent having been made by this court, is one made on the 23rd day of August 1866, by which this court, as a court of extraordinary original civil jurisdiction, removed from the Court of the Principal Şadr Amín at Tháná a suit there depending, of Jacob Eck against Jamnádás Javerlál. When I made the order of the 18th of March I was not aware of the existence of this precedent, but on examining it I do not find in my order any substantial departure from it. I, therefore, make absolute the order of the 18th of March 1871, on payment by the defendants, the Bombay, Baroda, and Central India Railway Company, of all reasonable costs incurred by the plaintiff, Pirbhái Khimji, in the said Bombay Court of Small Causes in the said suit, No. 4350 of 1871, since the institution thereof down to the time of making this order, and on the undertaking of the defendants to abide by and perform any order

this court may make with regard to the costs of the present motion, and of the proceedings so removed to this court which may be hereafter incurred. Following the form of the precedent which I have mentioned, I think the record of the reasons for the removal should be in these words:—"And it appearing to this court conducive to the purposes of justice to make such order, and especially on the grounds set forth in the said affidavit of Charles Albert Winter, sworn on the 15th day of March 1871: It is ordered," &c.

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Order accordingly.

Attorneys for the plaintiff: *Jefferson & Payne.*

Attorneys for the defendants: *Keir, Prescott, & Winter.*

—

Appeal No. 165.

NAROTAM BA'PU(*Plaintiff*) *Appellant.*
 GANPATR'AV PA'NDURANG ...(*Defendant*) *Respondent.*

April 29.

Prescription—Easement—Twenty Years' User—Act XIV. of 1859—Indian Limitation Act, 1871 (Act IX. of 1871).

Prior to the passing of the Indian Limitation Act, 1871, in order to give rise to an easement by prescription over immoveable property in the island of Bombay it was necessary for a plaintiff claiming such an easement to prove twenty years' uninterrupted user of it.

THE plaintiff in this case stated that the plaintiff was possessed of a piece of land, with a house standing thereon, in Agiary Lane; that there was a *galli* on the west side of the house, about twenty-four inches wide, which was the property of the plaintiff, and that the entrance to the *galli* from the street (Agiary Lane) was through a gate and thence over the land of the defendant, which had always been open ground, but shortly before the suit was brought had been built over by the defendant. The plaintiff, in its fourth paragraph, then stated that the plaintiff was entitled to a right of way from Agiary Lane through the gate over the open ground of the defendant, and back again, for him-

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self and his servants and workmen with or without poles, timber, scaffolding, and building materials, at all times of the year. Para. V.: "The said *galli* was little used except when the plaintiff or his predecessors wanted to repair the west wall of the house, on which occasions poles and scaffolding were erected in the *galli*."

The plaint then went on to allege an obstruction of the plaintiff's said right of way by the defendant, and prayed, amongst other things, that the *galli* might be declared to be the property of the plaintiff, and that the plaintiff might be declared to be entitled to a right of way from Agiary Lane through the gate and over the said close, and back again, for himself and his servants, &c.

The defendant denied the plaintiff's right to the *galli*, and alleged that it was the defendant's property. He also denied that the plaintiff was entitled to the right of way claimed in the 4th. paragraph of the plaint.

The case came on for hearing before COUCH, C.J., on the 29th of January 1870, when six issues were framed, but the first and second only are material for the purposes of this report:—1st, whether the said *galli* in the plaint described was the *galli* of the plaintiff; 2nd, whether the plaintiff was entitled to the right of way described in the fourth paragraph of the plaint.

The evidence given at the trial showed that for more than twelve years prior to 1865 (when the easement was interrupted) the plaintiff had been in the habit of making use of the *galli* for the purpose of whitewashing and repairing the west wall of his house, and that the materials &c. had been carried over the defendant's open piece of ground, but the title-deeds of the premises clearly showed that the *galli* belonged to the defendant. The Chief Justice found the first and second issues in favour of the defendant.

From the finding on the second issue alone, the plaintiff appealed. The appeal came on for hearing before WESTROPP, C.J., and BAYLEY, J. Its hearing was concluded on the 15th of

December 1870. Counsel for the appellant at first contended that the evidence showed an uninterrupted user of the *galli* and its approach by the plaintiff and his predecessors for twenty years, but failing in that contention they argued that proof of twelve years' uninterrupted user was sufficient to establish the plaintiff's right.

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Anstey and *Latham*, for the appellant :—'Twelve years' user as of right is sufficient to entitle the plaintiff to the easement he claims in this case. The English Prescription Act (2 & 3 Wm. IV., c. 71) does not apply to India. What law then does apply? The answer is Act XIV. of 1859, Sec. 1., cl. 12. An easement or servitude over land is a fragment or piece carved out of the entire ownership, and is clearly "an interest in land." Of that interest the plaintiff has had possession for more than twelve years, and the defendant cannot now deprive him of that possession, for suits for the recovery of any interest in immoveable property must be brought within twelve years from the time when the cause of action arises, otherwise what was before mere possession becomes ownership. Possession for twelve years creates a title under the Act, and entitles the possessor to sue. Act XIV. of 1859 is thus in effect not merely an Act of limitation, but also one of prescription. This is the view taken of the Act by the Lords of the Privy Council in the case of *Gunga Gobind Mundul v. The Collector of the 24 Pergunnahs*, where it is said: "If he (the owner) suffer his right to be barred by the law of limitation, the practical effect is the extinction of his title in favour of the party in possession; see *Sel. Rep.*, Vol. VI., p. 139, cited in *Macpherson*, *Civil Procedure*, p. 81 (3rd ed.)" (a), and at page 363 occurs the following dictum :—"As between private owners contesting *inter se* the title to the lands, the law has established a limitation of twelve years; after that time it declares, not simply that the remedy is barred, but that the title is extinct in favour of the possessor." That case has been referred to and acted upon in three subsequent cases: *Khajah Enaetoollah v. Kishen Soondur* (b), *Bissonath Komilla v. Brojo Mohun* (c),

(a) 11 Moo. Ind. App. 361.

(b) 8 Calc. W. Rep., Civ. R. 386

(c) 10 Calc. W. Rep., Civ. R. 61.

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and *Rajah Burodakant v. Prankristo Parooe* (d). There is also a case in Boulnois Reports p. 70, to the same effect. [BAYLEY, J., referred to *Bagram v. Khettranath Karformah*.*]

If this construction of the Act is erroneous, then we contend that there is no statutory period of prescription applicable to the case, and that courts, in laying down the law as to the time when an easement will be acquired by prescription, must be guided by analogy to the existing law of limitation. It was thus that, in analogy to the statute of James (21 Jac. I.), the period of prescription was fixed in England at twenty years : *Doe dem. Harding v. Cooke* (e). Easements were looked upon as a *casus omissus* from the words of the statute, but as within its spirit. The whole subject is discussed in the note to the case of *Yard v. Ford* in Williams Saunders (f). It will be said that the plaintiff here is seeking to establish a right, and not merely setting up a defence, as the easement has been discontinued ; but that is immaterial. The old statute of James only barred the remedy, and did not in words confer a title or create a right in the possessor, but a person under that statute who had possession of land for twenty years was allowed to recover the land on the strength of such a title : Bacon's Abr., Vol. IV., p. 463, Tit. Limitation, B. ; *Yard v. Ford*. He also cited on this point *Incorporated Society v. Richards* (g) ; *Burroughs v. M'Creight* (h) ; Taylor on Evidence, Vol. I., p. 89, para. 65. The current of authority in India is in favour of applying the analogy that we contend for : *Sri Viswambhara Rajendra v. Sri Saradhi Charana* (i), *Joy Prokash v. Ameer Ally* (j), *Kartik Chandra Sirkar v. Kartik Chandra Dey* (k), *Kristo Ohunder Chuckerbutty v. Kristo Chunder Burnick* (l), *Durga Churn v. Pearee Mohun* (m).

McCulloch and Farran, for the respondent :—Act XIV. of 1859 is an Act passed with regard to procedure, and never
 (d) 12 *Ibid.* 192.

* 3 Beng. S. Rep. O. J. 18.

(e) 7 Bing. 346.

(f) 2 W. S. 175 e.

(g) 1 Dr. & W. 258.

(h) 1 Jon. & Lat. 299.

(i) 3 Mad. H. C. Rep. 111.

(j) 9 Calc. W. Rep., Civ. R. 91.

(k) 3 Beng. L. Rep., A. C. J. 166.

(l) 12 Calc. W. Rep., Civ. R. 76.

(m) 9 Calc. W. Rep., Civ. R. 283.

was intended to terminate or create rights. Its preamble and first section show clearly that that is its scope: "Whereas it is expedient to amend the laws relating to the limitation of suits, it is enacted as follows:—(1) *No suit shall be maintained*, in any Court of Judicature, &c., unless the same is instituted within the period prescribed by the Act." The distinction between statutes of limitation which bar the remedy, and statutes of prescription which confer a title, has always been recognised by jurists. It was probably intended to supplement Act XIV. of 1859 by a prescription Act, but that has not yet been done. The case in Moore's Indian Appeals was decided under an old Bengal Regulation, and does not affect the present case. If the appellant were in the position of a defendant in possession, the section relied upon might avail him. It is then contended that the Court ought to act upon the analogy of Act XIV. of 1859, and fix a prescriptive period, as the Judges in England have done in analogy to the statute of James; but the Judges here are not in the same position. The law as administered in this Island by the Supreme Court definitely fixed the period of prescription at twenty years; that law is as binding on this court as if it had been enacted by the Legislature, and will so continue until altered by the Legislature. That the existing *statute* law was not affected by Act XIV. of 1859 appears from the cases of *Anáji Dattushet v. Morushet Bápushet* (n), *Rámbháu v. Búi Bápushet* (o). How then can judge-made law, which is equally binding, be affected? All the cases relied upon by the other side are cases from the Mofussil, when no law of prescription prevailed, and the Judges thought themselves at liberty to create one from analogy to the period of limitation laid down by the Indian Limitation Act. That this is so, appears from the judgment of Scotland, C.J., in the case of *Ponnusawmi Tevar v. The Collector of Madura* (p). In the only case cited from the Presidency Towns the twelve years' rule was considered inapplicable. That is the case of *Bagram v. Khettranath*

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(p) 5 Mad. H. C. Rep. 6, and see p. 20.

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Karformah (q). The High Court of Bombay has adopted the law of prescription as laid down by the late Supreme Court : *Pránjivandás Harjivandás v. Mayáram Sámaladás* (r). There is an unreported case where this point was raised and decided by Sausse, C.J., and Arnould, J., and if the Court were to hold otherwise now it would not adjudicate, but legislate.

Latham, in reply :—The formula as to statutes of limitation only barring the remedy has application only where there is a question as to the conflict of laws : Story on the Conflict of Law, para. 576 ; *Huber v. Steiner* (s) ; *Don v. Lippmann* (t). The case last cited for the respondents may be distinguished ; if not, the Court will overrule it.

Cur. adv. vult.

29th April 1871. WESTROPP, C.J. (after stating the facts and issues as given above), proceeded :—At first the learned counsel for the appellant contended that the evidence of De Silva and Dámodhar Pándurang showed at least a twenty years' enjoyment of the right of way without interruption. Their evidence not being very clear so far as it appeared on the notes of the learned Chief Justice, we caused those witnesses to be recalled and further examined. This further examination showed that it was quite evident that they could not establish a twenty years' uninterrupted enjoyment. It was, however, argued for the appellant that since Act XIV. of 1859, Sec. 1., cl. 12, came into force, the necessary period of enjoyment was reduced from twenty years to twelve years.

The Supreme Court of Bombay (before the passing of that Act) always required, in support of a claim to a right of way or other easement in the island of Bombay (not resting upon express grant), proof of at least twenty years' enjoyment. The case of *Pránjivandás Harjivandás v. Mayáram Sámaladás* (u), being a suit instituted in 1861 (Act XIV. of 1859 came into operation on January 1st, 1862), was decided by the High Court in 1862 in conformity with that old-established rule.

(q) 3 Beng. Law Rep., O. J. 18. (r) 1 Bom. H. C. Rep. 148.

(s) 2 Bing. N. C. 202. (t) 5 Cl. & F. 1.

(u) 1 Bom. H. C. Rep. 148.

Subsequently, in an unreported case, *Rámji Kesharji v. Jumnádas Khusháldás* (10th or 11th April 1865), it was contended before Sir Matthew Sausse and Sir Joseph Arnould that the suit, not having been instituted until 1864, was governed by Act XIV. of 1859, Sec. 1., cl. 12, or rather that, by analogy to the limitation of twelve years after the accrual of the cause of action fixed by that enactment for bringing suits for the recovery of immoveable property, the period of enjoyment necessary for the establishment of an easement was reduced from twenty years to twelve years. But the court said that it would be legislation on its part were it to adopt that argument, and accordingly adhered to the old rule as to twenty years. There was not any appeal preferred against that decision, and it is directly in point here. On a question of the nature of that before us, we should, even if we felt doubts upon it, greatly hesitate before we overruled the judgment of two such able and experienced Judges as those who decided that case, and interfered so far with the rights of property as to disturb what has, we have reason to believe, been regarded as the law here both before and since Act XIV. of 1859 came into force. So far, however, from entertaining any such doubts, we, after full consideration of the arguments addressed and authorities quoted to us, concur in that decision, and in the opinion of those learned Judges, that were we to substitute twelve years for twenty as the necessary period of enjoyment for a right of way, we should depart from the long-established law of this Island without any legislative sanction for such a course. We do not think it necessary to discuss this matter any further, and shall content ourselves with saying that the cases of *Bagram v. Khettranath Karformah* (v) and *Bhuban Mohan Banerjee v. Elliott* (w), which arose with reference to the right to light and air, do not afford any countenance to the argument on behalf of the appellant here. Both of those cases arose within the city of Calcutta, and the English law, as it stood before the passing of the Prescription Act, Stat. 2

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(v) 3 Beng. L. Rep., O. J. 18.

(w) 6 *Ibid.* 85.

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& 3 Wm. IV., c. 71 (which statute does not extend to India), was the law held to be applicable. Cases which arose in the Mofussil of Bengal and Madras which have been cited to us have not, we think, any bearing upon the present case, which arose within the island of Bombay.

We, therefore, affirm the decree of Sir Richard Couch with costs.

We are happy to find that the Indian Legislature has, in the recently passed Limitation Act (IX. of 1871), legislated on the subject of easements, and adopted the twenty years' period for the whole of British India.

Decree affirmed with costs.

Attorneys for the plaintiff: *Rimington, Hore, & Langley.*

Attorneys for the defendant: *Manisty & Fletcher.*

*Appeal No. 172.*1871.
June 10.SA'VAKLA'L KARSANDA'S..... (*Plaintiff*) *Appellant.*

ORA' NIZMUDDI'N bin ABDUL

KARI'M (*Respondent*) *Defendant.**Bonâ fide Purchaser without Notice—Title—Omission to make proper Inquiry into Title—Acquiescence of Owner—Building erected upon land by Purchaser—Owner lying by—Compensation.*

In order that a purchaser of immoveable property from a Hindú in the Island of Bombay may be entitled, as against the beneficial owner of such property, to set up the defence of being a *bonâ fide* purchaser without notice, he must show that he has made all proper inquiries into the title and as to the state of the family of his vendor, and of his vendor's predecessors in title for a period of twelve years at least before the date of his purchase.

Where a purchaser claims to hold land which he has purchased from a third person on the ground that the owner of such land has acquiesced in the sale, the purchaser must show clearly that the real owner was aware of the sale at the time it took place.

Where the owner of land was not aware of its being sold by his father to a third person, but, having heard of such sale, subsequently stood by and allowed the purchaser to build upon the land, it was held that the owner could not recover the land without compensating the purchaser for the building erected by him upon the land, and three months were allowed to the owner within which to pay such compensation.

THIS was a suit instituted by the plaintiff to recover a piece of land, with a dwelling-house upon it, being No. 96, Duncan Road, in Bombay.

The suit was heard by GREEN, J., in August 1870, when the following facts were given in evidence for the plaintiff:—

One Mánikchand Náthábhái, the grandfather of the plaintiff, separated from his only brother's family in January A. D. 1831. Mánikchand had three sons—Jamnádás, Karsandás (the father of the plaintiff), and Purshotam. The eldest, Jamnádás, was born before the separation in 1831; the dates of the respective births of Karsandás and Purshotam did not appear from the evidence given, but Karsandás (and apparently Purshotam also) was born before the year 1843. In the lastmentioned year Mánikchand purchased the premises in Duncan Road, the subject of the present suit. He

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was then living jointly with his sons. No evidence was given as to the source from which the purchase-money of this house was derived by Mánikchand, but it appeared that Mánikchand kept a grocer's shop in the *Nal Bazár*, as well as a warehouse at the *bandar*, and traded to the Malabar Coast. The conveyance of the premises was taken in Mánikchand Náthábhái's own name. Jamnádas separated from his father, Mánikchand, in January 1849, when he received certain property as his share, and gave a release to his father. Karsandás, who was said to be a gambler and a man of very dissolute habits, did not formally separate from his father, but, shortly after Karsandás' separation, received some property from his father and went with his family to live separate from his father. Purshotam continued to live jointly with his father until the death of the latter.

On the 3rd of January 1861, Manikchand made his will, and (amongst other things) thereby devised the Duncan Road premises and another house in Jagjivan Kíká Street to his grandson the plaintiff. The plaintiff was then about fourteen years of age. On the 4th of May 1861, a release, of which the following is a translation, was given by Karsandás to his father, Manikchand:—

“Shri 1½. To Bhansáli Mánikchand Náthábhái; written by Bhansáli Karsandás, the son of the living Mánikchand. To wit: I give in writing to you as follows:—On the 5th day of Mágсар Vad, S. 1917 (3rd January 1861) you in your lifetime made your last will in the presence of Mr. Khanderáv Moroji the solicitor. In that will you have directed that there should be given to my son Chiranjivábhái Sávaklál, the son of (me) the living Karsandás, two houses: (i.e.) One house situated in Jagjivan Kíká Street, adjoining that of Gujá Jivá, and one house situated opposite to Durgá Devi on the Duncan Road. These houses you, of your own free will and pleasure, in your lifetime, have this day made over to me. The rent thereof from this day is given into my possession; and as to whatever deeds, papers, and vouchers relating to these houses there were with you, all these I have carefully taken possession of. For that I have executed this release and got a counterpart executed to me, and from this day I am to have power over the rent of the abovenamed houses. You have no claim thereon. 10th Chaitra Vad S. 1917 (4th May 1861).

(Signed) “KARSANDA'S MA'NIKCHAND.”

The plaintiff at the trial produced two letters, each bearing date the 4th of May 1861, which he stated had been signed

by his grandfather Mánikchand and given by the latter to him (the plaintiff). These letters were addressed to the tenants of the premises in Duncan Road and Jagjivan Kíká Street respectively, and required them to pay the rent of these houses thenceforth to the plaintiff. The plaintiff alleged that he took one of these letters to the tenant of Duncan Road premises and showed it to him, and that the tenant said: "How can I pay you the rent, as you are a minor? I will open an account in the name of your father and pay to him." The plaintiff was then living with his father. The other letter the plaintiff alleged that "he took to the tenant of the house in Jagjivan Kíká Street, who opened an account with the plaintiff on the back of the letter; that the plaintiff received rent under it for seven or eight months, after which his father, Karsandás, received the rent; that the letter was cancelled and given up to the plaintiff by the tenant when the latter vacated the house." These letters were not annexed to the plaint, but no attempt was made in cross-examination to impeach their genuineness.

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Mánikchand Náthábhái died in the middle of the year 1863. The plaintiff and his father were then living together in a street near Duncan Road and Jagjivan Kíká Street. The father retained possession of the documents relating to the two houses, and received the rents of them. On the 13th of October 1864 Karsandás (as the plaintiff alleged, without his knowledge) sold the premises in Duncan Road, which then stood in the Collector's books in Mánikchand's name, to one Devji Hirji, who was at that time the tenant of the Jagjivan Kíká Street house. At the time of the sale to Devji Hirji there was no building standing on the Duncan Road property, the building that had originally stood upon it having fallen or been pulled down. Before Devji's purchase a *batlái* was beaten in the neighbourhood, in the usual manner. Devji Hirji about the same time purchased the house in Jagjivan Kíká Street from Karsandás. The plaintiff stated that he became aware of the sales of the two houses some time after they took place, from inquiries he made of workmen who were repairing the Jagjivan Kíká Street house;

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that thereupon he remonstrated with his father and asked him what he had done with the purchase-money, when his father became very angry and turned the plaintiff out of his house.

The plaintiff then went to live with his maternal cousin in another house in Jagjivan Kíká Street. Devji Hirji sold the premises in Duncan Road on the 9th of January 1865 to the defendant. Advertisements of the sale were inserted in the Native and English newspapers. After purchasing the property the defendant erected a shed upon it at a cost of about Rs. 1,420. The plaintiff gave notice of his claim in September 1869, and excused his delay by stating that he was young and without means when turned out of his father's house, and that for a long time he was unable to ascertain the name of the purchaser of the house in Duncan Road.

Upon the above facts, and not being satisfied with the truth of the plaintiff's story as to his ignorance of the sale to Devji, the learned Judge held that (even assuming that Mánikchand had power to dispose of his immoveable property by will in the manner he had done without the assent of Karsandás) the will of Mánikchand was revoked by the subsequent release of the 4th of May 1861; and that, even assuming that not to be so, the plaintiff knew of and acquiesced in the sale to Devji. A decree was made in favour of the defendant with costs.

From this decree the plaintiff appealed, and the appeal was argued before WESTROPP, C.J., and SARGENT, J., in June 1871.

Anstey and Starling, for the appellant:—There is no ground for questioning Mánikchand's power to devise this property. Mánikchand was a separated Hindú. To render him such, a formal partition proved by documentary evidence is not necessary: West and Bühler's Digest, Part II., Introduction, p. 12; *Sreemuttee S. Dossee v. Kartick Churn Mittra* (a); *Mussamut Deo Bunsee Kooer v. Dwarkanath* (b); *Lalla Moha-*

(a) Bourke's Rep., 326.

(b) 10 Calc. W. Rep., Civ. R. 273.

beer *Pershad v. Mussamut Kundun Koowar* (c). The doctrine is discussed in *Luximon R. Sadasew v. Mullar Row Bajee* (d). The property being self-acquired, Mánikchand had full power to dispose of it by will under Mitákshará law, and Karsandás in any case had no right to dispose of it: *Muddon Gopal Thakoor v. Ram Buksh Pandey* (e). The release is not a revocation of the will, but rather a recognition (and if necessary a ratification) of it by Karsandás. Under the terms of the release, when read by the light thrown on its meaning by the contemporaneous letters written by Mánikchand, Karsandás became a trustee and manager for his son the plaintiff: *Gopekrishno Gosain v. Gungapersaud Gosain* (f). The subsequent receipt of rent by Karsandás is, therefore, quite consistent with the meaning contended for. The only question that remains is, Did the plaintiff acquiesce in the sale by Karsandás to Devji? We contend that he did not. He was at that time under the *penumbra* of infancy, and, even if he knew of the sale, would be entitled to protection. Mere lying by under circumstances like the present does not amount to acquiescence: *Jorden v. Money* (g). See, too, *Phillipson v. Gatty* (h), *Gregory v. Gregory* (i). There is (as is admitted by the court below) no direct evidence that the plaintiff knew of the sale to Devji Hirji, and the court will not presume such knowledge on the part of the plaintiff from the mere fact of his having been living with his father at the time, or from the fact that a *battáki* was beaten. Besides, Devji Hirji cannot be considered a *bonâ fide* purchaser without notice. There was enough to put him on inquiry. The land stood in Mánikchand's name, as also the title-deeds, and the purchaser was, therefore, bound to make full inquiries into the state of Mánikchand's family and whether he had made a will. He was not dealing even with the apparent owner, and is not entitled to protection: *Bishambur Naik v. Sudasheeb Mohapatter* (j). The defendant,

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MUDDI'N.(c) 8 *Ibid.*, 116. (d) 2 Knapp, P. C. C. 60.

(e) 6 Calc. W. Rep., Civ. R. 71.

(f) Norton's L. C. on Hindú Law, 134; S. C. 6 Moo. Ind. App. 53.

(g) 5 Ho. Lo. Ca. 185, 213.

(h) 7 Hare 523. (i) Cooper 201. (j) 1 Calc. W. Rep. 96.

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of whose purchase it is not even pretended that the plaintiff was aware, is in no better position than his vendor.

Mayhew and *Latham*, for the respondent :—We admit that there need not be documentary evidence to prove partition, and that the *factum* of *Mánikchand's* will is proved ; but we contend that the release is in its terms clearly an instrument of gift of the houses to *Karsandás*, and, therefore, *pro tanto* a revocation of the will. It is impossible to believe that the plaintiff was ignorant of the sale made by his father, with whom he was then living, yet admittedly he took no step to prevent it or warn the purchaser. Having thus stood by, and allowed an innocent person to purchase, he will not now be allowed to set that sale aside. His want of *bona fides* is proved by his delay in bringing his suit or giving notice. Even when, as he admits, he went to the premises in 1865-1866 (and the building of the shed was then going on), he gave no notice. Under these circumstances, we contend, he cannot now recover the property : *Ramsden v. Dyson* (k), recognised as law in India in the case of *Náráyan v. Bholá-gir* (l); *Bassett v. Norworthy* (m). The cases relied on by the appellants are cases in which *ceux qui trustent* sued their trustees, and not innocent purchasers from the latter, which is the case here.

WESTROPP, C.J.:—We should feel great difficulty in this case in saying, from the evidence before the court, that the plaintiff has acquiesced in the sale made by his father of the premises in Duncan Road. He was a very young man at the time his father sold the house, having then only just attained his majority, and from the mere fact of there having been afterwards a dispute between him and his father about the purchase-money of the house, and of his subsequently standing by and taking no steps, it would be difficult for us to infer that he knew of the sale at the time when it took place. It lies upon the defendant to satisfy us upon that point before we can give effect to the plea that he derives his title from

(k) Law Rep. 1, Eng. & Ir. App. 129, 140.

(l) 6 Bom. H. C. Rep., A. C. J. 80.

(m) 2 Wh. & Tu. L. Ca. Eq. 19.

a purchaser who rests his title, as against the plaintiff, upon an alleged acquiescence of the latter in the sale. But though we feel this difficulty upon that point of the defendant's case, we are perfectly satisfied that the plaintiff must have known of the building of the shed upon the land by the defendant and Dhondū his agent. From this, however, we cannot infer that the plaintiff was cognisant of the sale at the time it took place, though he must have known of it subsequently, as the plaintiff himself admits that he went to the premises in 1865 or 1866, when, it is proved, the building was actually going on. The question therefore arises, whether, before the plaintiff can recover the land, the defendant is not entitled to compensation for the building he has erected upon it. Upon that point we are willing to hear counsel. As to the will, we do not think that it was revoked by the document that has been called the release (exhibit E). That document is explained by the contemporaneous letters written by the testator, into the genuineness of which, seeing that no attempt has been made to impeach them in the Division Court, we do not think that we ought now to inquire. The plaintiff being the owner of the property, and not having been proved to have been aware of the sale at the time it took place (though he must have known of it subsequently) it lay upon the purchaser, claiming to be a *bonâ fide* purchaser without notice, to show that, before he completed his purchase, he did everything that he ought to have done and made all proper inquiries. But that he has not done. He ought to have inquired how the property, which within twelve years before the date of his purchase stood in the name of Mánikchand, came to Karsandás, and how Karsandás came to sell it, and what was his right to do so. Not having taken ordinary precaution, he cannot now be allowed to benefit by his own want of care. He ought to have been able to satisfy the court that he had inquired into the title at least during the twelve years preceding his purchase. We are ready to hear counsel upon the question whether, on our view of the case—namely, that the plaintiff did not know of the sale at the time it took place, but subsequently heard of it, and afterwards remained silent when he must

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have known that the defendant was building upon the land —the latter is entitled to compensation for the money he has expended in improving the property.

Latham and *Mayhew*, for the defendants, were heard on this point, and cited *The Earl of Oxford's Case* (n). [WESTROPP, C. J., referred to *Powell v. Thomas* (o), and *East India Co. v. Vincent* (per Hardwicke, C. J.) (p).] *Savage v. Foster* (q) and *Jones v. Smith* (r) were also cited.

Starling was heard in reply on the question of the amount of compensation to be allowed to the defendant and on the question of costs.

PER CURIAM:—The decree of the Division Court must be varied by ordering that the plaintiff do recover from the defendant the Duncan Road house on payment by the plaintiff, within three calendar months from this 10th day of August, of the sum of Rs. 1,240, and in the event of the plaintiff paying to the defendant the said sum within such period each party is to bear his own costs; but in the event of the plaintiff failing to pay the said sum within three calendar months, then the decree must be for the defendant with costs.

Decree accordingly.

Attorneys for the plaintiff: *Jefferson and Payne.*

Attorneys for the defendant: *Shápurji and Thákurdás.*

(n) 2 Wh. & Tu. 548 (3rd ed.).
 (q) 9 Mod. 35.

(o) 6 Hare 300.
 (r) 1 Hare 43.

(p) 2 Atk. 83.

CHABILDA'S LALLUBHA'I *Plaintiff.*
 THE MUNICIPAL COMMISSIONER OF BOMBAY ... *Defendant.*

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Injunction—Acts of Trespass committed by Public Functionaries—Municipal Act, Secs. 131 and 160—Setting back Houses—Continuing Trespass—Unfounded Apprehensions of Plaintiff.

Principles upon which the court will interfere by injunction to restrain acts of public functionaries in excess of their statutory powers considered.*

If the Municipal Commissioner of Bombay is desirous of putting in force the provisions of Sec. 131 of the Municipal Act (Bombay Act II. of 1865) and compelling a householder (whose house has been taken down) to set the foundations back to the general level of the street, he must exercise his powers when, or within fourteen days after, the householder gives notice, under Sec. 160 of the Act, of his intention to rebuild.

Where a trespass of a continuing nature has been committed by the defendant, but has been discontinued before suit brought, the Court will not interfere by injunction to restrain the defendant from continuing such trespass merely because the plaintiff entertains vague apprehensions that the trespass may be recommenced.

THE plaintiff in this case was the owner (subject to certain reversionary rights on the part of Government, immaterial for the purposes of this report*) of a piece of land at the corner of Chimmá Butcher Street leading to the Nal Bazár markets.

In 1866 the Collector of Bombay issued a notice, under Act VI. of 1857, that the land in question was required for public purposes, namely, to enlarge the Nal Bazár markets, but no further proceedings were taken under this notice. A similar notification (dated 3rd February 1868) was published in the *Bombay Government Gazette* of the 6th of February 1868, but the purpose for which the land was required was not specified in it. The fact of the lastmentioned

* NOTE.—The grant to the predecessor in title of the plaintiff, which bore date 8th September 1840, was in the form of a written permission to him by Government to occupy the premises upon payment of six pies per annum per square yard, “the said ground to be at any time resumable by Government without any compensation whatever being given, and the materials of the buildings or improvements to be removed at the grantee’s expense.” The plaintiff contended that the provisions of this permission had been waived or altered by the subsequent conduct of Government.

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notification having been made was expressly brought to the notice of the plaintiff by a letter sent to him by the Collector on the 26th of July 1869, in reply to a request on the part of the plaintiff to be allowed to purchase the fee simple in the land.

On the 5th of August 1869, and again on the 15th of September 1869 (no steps having then been taken under the notification of February 1868), the plaintiff, being then about to purchase the land, wrote through his solicitors to the defendant asking to be informed whether it was still required for public purposes.

The defendant, on the 25th of September 1869, wrote in reply to say that the land was not required for a public purpose.

In November 1870 (the exact date was not in evidence) the buildings that had theretofore stood upon the land were almost completely destroyed by fire.

The plaintiff thereupon, in accordance with Sec. 158 of Bombay Act II. of 1865, on the 25th of November, sent in a building-application to the defendant with a plan. On the 30th of November the application and plan were returned to the plaintiff on account of their not bearing the proper stamps (one anna each). They were then resubmitted, properly stamped, and on the 12th of December 1870 the following reply was received by the plaintiff:—

“TO CHABILDA'S LALLUBHA'I, Esq.

“SIR,—In reference to your building-application of the 25th ultimo, I regret to have to inform you that the permission to rebuild your *chals* at Chimmá Butcher Street cannot be granted, since the property is required for public purposes.

“A duplicate of your application is herewith returned. The original is kept in this office for record, as usual.

“I have the honour to be, &c.,

“RIENZI WALTON,

“Deputy Executive Engineer, Municipality.

“Bombay, Executive Engineer's Office,

“12th December 1870.”

After some further correspondence, the plaintiff, on the 21st of February 1871, received the following letter:—

“FROM THE DEPUTY EXECUTIVE ENGINEER, MUNICIPALITY,

“TO CHABILDA’S LALLUBHA’I, Esq.

“SIR,—With reference to your letter dated the 7th instant, I have to inform you that the Commissioner declines to alter his original refusal.

“RIENZI WALTON, C.E.”

On the 19th of March the plaintiff commenced and very rapidly proceeded to build *cháls* on the land in question in accordance with the plans submitted to the Deputy Executive Engineer in November 1870.

On the 20th of April, Mr. Walton, by the direction of the defendant, wrote to the Commissioner of Police requesting him to send some police constables to the site of the plaintiff’s property, as the defendant wished the work of rebuilding to be stopped until further orders; and on the same day the Commissioner of Police directed Superintendent Brown to carry out the order of the defendant. The action that Superintendent Brown took under this order was detailed in his affidavit, from which the following is an extract:—

“On the twentieth of March, I, acting upon the verbal orders of the Commissioner of Police, went to the property at about 4 P.M. On arriving there I saw the plaintiff, who had a very large number of workmen employed in building *cháls*. The building was a mere wooden *chál*, which at the time I went to the property was already nearly finished, and another was just being commenced. At the time I first went to the spot I had not got any written authority from the Commissioner of Police to cause the work to be stopped, and I, therefore, merely went there and spoke to the plaintiff, telling him that I had not yet got the order. I received the order between 5 and 6 o’clock. I then showed the order to the plaintiff, and requested him to tell his men to desist from the work, and he in reply told me to come up on the raised foundation of the building. I hesitated, and he repeated his invitation, telling me not to be afraid. When I showed the plaintiff the order, he asked me to let him take a copy of it, but I told him that I had no such instructions. The plaintiff, when I went on the spot, himself told his men to stop the work, and neither I nor any of my sepoys either touched or spoke to any of the plaintiff’s workpeople. On being ordered by the plaintiff, as aforesaid, to desist from the said work, the men did so desist, and, being satisfied with that, I went away leaving a sepoy on the spot, and giving orders to a Native jamadár to see that the work was not continued, and to give me information if the men recommenced. I kept surveillance over the property until the middle of the month of May last, when heavy rain fell, and the plaintiff then commenced

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tiling and going on with the *cháls*, which my Native subordinate reported to me; and I, after reporting the matter to the Deputy Commissioner of Police and the Municipal Commissioner, under instructions from the latter, withdrew the surveillance of the police, and neither I nor any of my subordinates have since that time in any way hindered the plaintiff or his men from the work, and the *chál* is now, and was soon after it was built occupied by a number of tenants of the plaintiff, who have shops therein. Neither I nor any of the police have been in possession other than for the purpose of keeping such surveillance as aforesaid, and since the middle of May last, when the workmen recommenced the work, in which they were not interfered with, neither I nor any of the police have been in possession even to that extent."

The defendant made an affidavit in which he stated that the property was almost entirely destroyed by fire in the month of November 1870, and inasmuch as the same had been very much in the way of the very crowded approach to the markets then already built in the neighbourhood, and, in his opinion, came within the meaning of Sec. 131 of Act II. of 1865, and as it was very desirable that the street and approaches to such markets should be widened and improved, he determined not to sanction any application to rebuild the same, but, on the contrary, to take the site upon which the building so destroyed by fire had stood, for the purposes of such improvements to the street and approaches to the markets, under the provisions of the said Act II. of 1865. That the plaintiff nevertheless commenced to rebuild the *cháls*, and that he (the defendant) not wishing to be put to the necessity of pulling down more of the house than had already been erected, as empowered by Sec. 160 of Act II. of 1865, caused the Deputy Executive Engineer to write to the Commissioner of Police the letter of the 20th of March. That he was ready and willing to pay the plaintiff compensation for the value of all material upon the ground at the date when his application to build was refused, and that should he be successful in substantiating his rights to hold the said land as against Government in a suit which was about to be filed against him by Government, the defendant was further ready and willing to pay the plaintiff compensation for the value of the land taken for the purpose of improving and widening the street and approaches to the market; and that throughout he acted with perfect *bona fides*, and was actuated

by no other motive than to carry out the provision of the Act for these purposes and in the public interest.

In addition to the several letters before referred to, the defendant on the 21st of March 1871 wrote to the plaintiff the following letter, which the plaintiff alleged that he did not receive until the 24th of March :—

“To CHABILDA’S LALLUBHA’I.

“SIR,—I hereby give you notice that your *chál* No.—in Mutton Row and Chimmá Butcher Street, and which projected beyond the regular line of the said street, having been taken down for the purpose of being rebuilt or altered, I, under and by virtue of the powers and authorities given to and vested in me by Sec. 131 of Bombay Act II. of 1865, hereby require you to set back the same to or towards the line of the street in the manner indicated by the line staked out by the *mistri* of this department. And take notice that should you build beyond the line of the street so indicated as aforesaid, or in any other respect contrary to the provisions of the said Act, I will, as empowered by Sec. 160 of the said Act, cause the building to be altered or demolished, as the case may require, and will proceed to recover from you the expense thereby incurred, in the manner in the said Act provided. I will make full compensation to you for any damage you may sustain by a compliance with the terms of this notice, the amount of such compensation, in case of dispute, to be settled by the Court of Petty Sessions in the manner in the said Act provided.

“ARTHUR CRAWFORD,
“Municipal Commissioner.”

The plaintiff, on the 25th of March 1871, wrote, through his solicitors, in reply, as follows :—

“Bombay, March 25th, 1871.

“To ARTHUR CRAWFORD, Esq.,
Municipal Commissioner.

“SIR,—Your notice of the 21st of March instant delivered to our client Mr. Chabildás Lallubháí on the morning of yesterday has been placed in our hands, and in reply we are instructed to state that due notice of our client’s intention to rebuild the *chál* was given to you, and as it has been finished, and no requisition to set it back was made to our client until after the rebuilding was completed, our client is advised that you cannot now call upon him to set back the building which he has erected on the old foundation.

“Yours obediently,
“JEFFERSON & PAYNE.”

On the 3rd of April 1871 the Collector of Bombay wrote to the plaintiff requiring him to vacate the land in accordance with the terms under which it was held, as the Government required the land. No steps were taken to enforce this requisition.

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On the 4th of April 1871 a month's notice of action in respect of the premises was given to the defendant.

On the 9th day of June a plaint was, accordingly, filed, in which the plaintiff prayed—(1) That he might be declared to be entitled, as against the defendant, to the peaceful possession and enjoyment of the premises, and of all his, the plaintiff's, rights and equities into or out of the same; and that the defendant should be ordered and directed to clear the said possession and to yield it up to the plaintiff forthwith. (2) That the defendant, his subordinate officers, agents, and servants, should be restrained by injunction from continuing, or allowing any other person or persons under their control or authority respectively from continuing or remaining in the possession or occupation, or resuming or retaking the possession or occupation, of the purchased premises respectively, or from preventing or impeding the rebuilding by the defendant of the destroyed portion thereof, or the works of the plaintiff in or towards such rebuilding, without the order or sanction of the court first obtained in that behalf. (3) That the defendant should be decreed to pay unto the plaintiff the sum of Rs. 30,000 (or such other sum as the court should direct) as and for his damages sustained or incurred in the premises through the wrongful actings, doings, and defaults of the defendant, and also the costs of the suit.

On the 10th of June, *Anstey* obtained a *rule nisi* for an injunction in the terms of the second part of the prayer of the plaint.

Green now showed cause, and contended—(I.) that the act sought to be restrained was a mere act of trespass, and that it was not the practice of Courts of Equity to restrain such acts by interlocutory injunction, unless in cases where the apprehended injury was irremediable, and was of such nature as to be incapable of being compensated by damages. (II.) That the defendant was justified in what he had done, under the provisions of Act II. of 1865 (Bombay), Secs. 131 and 160. (III.) That the alleged trespasses and injuries had ceased before action brought, and there was nothing to show an intention on the part of the

defendant to continue them. He cited on the first point *The Attorney General v. Cambridge Consumers Gas Co.* (a), *The Attorney General v. Sheffield Gas Co.* (b); on the last, *North Union Rail Co. v. Bolton and Preston Rail. Co.* (c).

Anstey (with him *Marriott*), in support of the rule, cited on the last point *Inchbald v. Robinson* (d). He also relied on the case of *The Queen v. Lord Mayor of London* (e); *Gale on Easements*, pp. 430, 432; *Kerr on Injunctions*, p. 199.

Cur. adv. ult.

24th June 1871. SARGENT, J. (after reading the plaint and referring to the affidavits, continued):—The justification of the acts of the Commissioner, the defendant in this case, is based upon the powers given to him by Act II. of 1865, and more particularly upon the provisions of the 131st and 160th sections. It will, therefore, be necessary to refer somewhat in detail to the provisions of the Act; but before doing so I must notice an objection that was taken *in limine* by Mr. Green—that even assuming the facts to be as stated by the plaintiff, and his contention to be correct, the act complained of was a simple act of trespass, and that it is contrary to the practice of Courts of Equity to restrain acts of trespass, unless the injury apprehended from them is of such nature as that its repetition would cause irreparable loss to the plaintiff. That may be true when the trespass complained of is the act of a private individual, but the rule does not apply, I apprehend, when the act, as here, is the act of a public functionary. For the correct exposition of the law applicable to public companies, and persons in a similar position, I cannot do better than refer to Mr. Kerr's work on *Injunctions* at page 295, where he says: "The principles upon which the Court acts in restraining trespass on the part of companies or bodies of functionaries incorporated by Act of Parliament, and having compulsory powers to take or enter lands, differ in some respects from those upon which it acts in restraining trespass by individuals. A private person who applies for an injunction to restrain a public incorporated company or body of functionaries from entering

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(a) *Law Rep.* 4, Ch. App. 71. (b) 3 De G. M. & G. 304.
(c) 3 *Ra. Ca.* 345. (d) 17 *W. Rep.* 272. (e) *L. Rep.* 2 Q. B. 292.

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illegally on his land is not required to make out a case of destructive trespass or irreparable damage. The inability of private persons to contend with these powerful bodies, which have often large sums of money at their disposal, and are often too prone to act in an arbitrary and oppressive manner, raises an equity for the prompt interference of the Court to keep them within the strict limits of their statutory powers, and prevent them from deviating in the smallest degree from the terms prescribed by the statute which gives them authority. If they enter upon a man's land without taking the steps required by the statute, the Court will at once interfere. A man has a right to say that they shall not affect his land by stirring one step out of the exact limits prescribed by the statute. The principle upon which the Court interferes in such cases is, not so much the nature of the trespass, as the necessity of keeping them within control. It is incumbent on them to prove clearly and distinctly from the statute the existence of the power which they claim a right to exercise. If there is any doubt with regard to the extent of the power claimed by them, that doubt must undoubtedly be for the benefit of the landowner, and should not be solved in a manner to give to the company any power that is not clearly and expressly defined in the statute. The Court has not only jurisdiction to interfere to restrain a company from affecting a man's land by stirring out of the exact limits prescribed by the statute which gives them authority, but is almost bound to interfere, and will, as a matter of course, interfere, unless the damage is so slight that no injury has arisen or is likely to arise, or unless the injury, if any has arisen, is so small as to be hardly capable of being appreciated by damages, or unless the remedy by damages at law is adequate and sufficient, or is, under the circumstances of the case, the proper remedy, or unless the trespass is one merely of a temporary nature."

I now turn to a consideration of the sections relied on in justification of the acts that have been committed by the defendant. These sections are to be found under the heading "General Conservancy of the City." This part of the Act

confers very extensive powers upon the Commissioner. Sec. 107 gives him power, in laying out new streets or in improving existing ones (with the sanction of the Justices), to purchase land necessary for the formation or improvement of such streets. Under Sec. 108 he may agree with the owners of such land for the purchase of it: if that can be done, well and good; but if no such agreement is come to, Sec. 109 points out the course that is to be pursued. The Commissioner is to apply to the Governor in Council, and the Governor in Council, after making inquiries, may declare that the land is needed for a public purpose, and may order proceedings to be taken for obtaining possession of the same for Government, and for determining the compensation to be paid to the owner. What these proceedings were in October 1870 is pointed out in Act VI. of 1857. The Commissioner is not given any power to acquire land otherwise than by agreement with the owner. If he does not enter into such agreement, he must apply to the Governor, and the Governor, not the Commissioner, then is to proceed under Act VI. of 1857. The next section I refer to is Sec. 131, which enacts that when any house or building (any part of which projects beyond the regular line of a public street) has either entirely or in greater part been taken down, burned down, or fallen down, the Commissioner may require the same, when being rebuilt, to be set back to the line of the street; and there is then a proviso that the Commissioner shall make full compensation to the owner for the damage he may sustain in consequence. The question then arises, when is that power to be exercised by the Commissioner. Now Sec. 158 enacts that before beginning in or near any street to build any house, the person intending to build such house shall give to the Commissioner notice thereof in writing, which notice is to be accompanied with a plan containing certain particulars prescribed by the section. And, by Sec. 159, the Commissioner may, within fourteen days after the receipt of the notice, require the house to be set forward or back. But if he allows the fourteen days to elapse, then, by Sec. 161, the person giving such notice may proceed to build, provided such building be otherwise in accordance with the Act—that is,

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does not contravene any of its express enactments. I think the Commissioner must, if he wishes to exercise the power given him under Sec. 131, exercise it within the fourteen days prescribed by Sec. 159, and that omitting to do so he cannot afterwards exercise it.

To apply these sections to the facts of this case, we find that the plaintiff's buildings having been destroyed by fire, he gave notice of his intention to build on the 24th of November. That notice was returned to him, but was resubmitted, properly stamped, on the 30th of November, together with a plan. Within fourteen days the Municipal Commissioner did send a letter, but not one contemplated by Sec. 159 ; it was simply a notice that the land was required for public purposes—a notice which, as I have pointed out, the defendant had no authority to issue. Such a notice could only be given in the usual course by Government. I consider, therefore, that the notice which the Municipal Commissioner did give was not a notice which would prevent the plaintiff from proceeding to build. No other notice was given.

That being so, the plaintiff found himself in a position to act according to the power given by Sec. 161 to a person to whom no approval or disapproval had been signified, namely, to proceed at once to build. It is true there was a subsequent notice given on the 21st of March, but that, being after the fourteen days, could not prevent the plaintiff from building, unless it can be held that Sec. 131 is one which can be put in force at any time, and that I have decided cannot be done.

Now there can be no doubt upon the affidavits that the police did compel the plaintiff to desist from proceeding with the building ; and if that state of things had existed up to the time when this injunction was applied for, it would be the duty of the court to restrain the Municipal Commissioner from continuing the acts in question. The Municipal Commissioner has stated that what he did he did according to his view of the Act, and there is not any reason to suppose that he was actuated by any other motive. But that does not affect the question before the court, for, whatever the motive, it would be the duty of the court to restrain the Commis-

sioner if his acts are in excess of his powers. It appears, however, that in the middle of May the police withdrew altogether from the building, and that since that time there has been no interference whatever, except what the plaintiff calls surveillance. From the time that the police withdrew from the premises the unlawful exercise of power ceased; and the question, therefore, which arises is, whether the plaintiff had any reasonable apprehension that these unlawful acts would be resumed before the cause came on for hearing.

I think he could not have been under any such apprehension. The acts here had ceased more than a fortnight before the plaint was filed. I cannot find any case in which the Courts of Equity have interfered by injunction where the act complained of had entirely ceased at the time of the injunction being applied for. There was a case cited by Mr. Anstey, *Inchbald v. Robinson* (a), but it does not apply to the facts before me. That was the case of a nuisance, and the court thought that the plaintiff was justified in apprehending there would be a repetition of it, from his experience of what had occurred the year before. Here the acts complained of had *entirely ceased* at the time this suit was filed. The police, in the middle of May, withdrew from the premises, and they have not since then interfered with the building operations of the plaintiff further than to exercise what the plaintiff calls a surveillance over the property—a vague term, upon which I do not think that the court is called upon to act.

In a case like this I must look, moreover, to the public convenience, and seeing that the defendant is the person charged with the general sanitary arrangements of this town, having various functions to discharge in respect of its streets and buildings, injury might, under certain circumstances, be caused to the public by my granting this injunction in the very general and somewhat indefinite terms in which it is prayed. On this ground, therefore, as well as on the ground that the plaintiff, at the time the rule *nisi* was

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(a) 17 W. Rep. 272.

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granted, could not have had any reasonable apprehension that the acts complained of would be recontinued, the rule nisi must be discharged, but, under all the circumstances of the case, without costs.

Rule nisi discharged without costs.

Attorneys for the plaintiff: *Jefferson & Payne.*

Attorneys for the defendant: *Leathes & Crawford.*

June 15.

Suit No. 655 of 1868.

VAKATCHAND LAKHMICHAND *Plaintiff.*

THE ADVOCATE GENERAL *et al.* *Defendants.*

Practice—Hearing of Suit—Joinder of new Parties—Civ. Proc. Code, Sec. 73—Proceedings in Commissioner's Office.

After a decree has been made whereby a suit has been referred to the Commissioner's office to have accounts taken and property sold, the Court has still power (if it should be found necessary) to add, as fresh parties to the suit, persons who are interested in its subject-matter and are likely to be affected by its results.

THIS suit was instituted by the plaintiff, Vakatchand Lakhmichand, as executor of the will of one Párvatibái, who had devised and bequeathed one-half of her estate for certain charitable purposes. The estate of Párvatibái consisted amongst other things of a house (No. 66) in Boráh Bazár Street and a house (No. 51) in Bazár Gate Street.

The house (No. 66) in Boráh Bazár Street had been mortgaged by the plaintiff, in his capacity of executor, to the defendant Vallabhbháí Lallubháí, who, in the pretended exercise of a power of sale contained in his deed of mortgage, had sold the house to the defendant Vrijlál Gokaldás.

The object of the suit was to have the lastmentioned sale declared void and set aside; to have the house, the subject of that sale, and also the house (No. 51) in Bazár Gate Street, sold under the order of the court; and to have it referred to the Commissioner of the court to ascertain and report how much of the proceeds of the houses was appli-

cable to the maintenance of the charity; to have that amount (when ascertained) invested, and to have (if necessary) a scheme framed for the management of the charity and the application of its funds, and to have the plaintiff appointed trustee and manager of the charity.

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The Advocate General was made a defendant to represent the charity.

The suit came on for hearing before Sir Joseph ARNOULD on the 2nd of February 1869, when, by consent, the sale of the house in Boráh Bazár Street was set aside, and the Commissioner was directed to sell both houses, to take an account of the administration of the estate of the testatrix, and to ascertain and report how much of the proceeds of the two houses was applicable to the charitable purposes mentioned in the will of the testatrix; and the sum of Rs. 5,540 was directed to be paid to the defendant Vallabhbháí Lallubháí in full satisfaction of his mortgage; the respective costs of the Advocate General and of the plaintiff down to the date of decree were directed to be paid out of the estate of the testatrix, the defendants other than the Advocate General being directed to bear their own costs. The question of further costs not provided for by the decree was reserved.

When the suit was in the Commissioner's office, one Abdul Rahim Mallikji came forward and claimed to be a mortgagee of the house in Bazár Gate Street under a mortgage made in his favour by the plaintiff, and requested the solicitors for the Advocate General to consent to his exercising his power of sale under the mortgage. This request was refused, and Abdul Rahim was informed that a motion was about to be made to the court to have him made a party to the suit, when the property would be sold in the regular way before the Commissioner, and he (Abdul Rahim) would be paid his principal, interest, and costs out of the proceeds.

Abdul Rahim refused to consent to become a party to the suit, on the ground that it was a more troublesome and expensive course than that of exercising his power of sale under his mortgage.

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The Commissioner certified to the court that, under the circumstances of the case, it was impossible for him to proceed with the sale of the Bazár Gate Street property.

On the 24th of April 1871 the Acting Advocate General (*the Honorable A. R. Scoble*) moved that the decree in the suit, and all proceedings therein, might be amended by making Abdul Rahim a party thereto, and that a direction might be made for the payment to Abdul Rahim, out of the moneys to come to the hands of the Commissioner from the proceeds of the sale of the house in Bazár Gate Street, of the principal, interest, and costs due to Abdul Rahim under his mortgage-deed. The motion, by consent, was adjourned, and came on for disposal on the 5th of June 1871, when

The Acting Advocate General moved in the terms of the notice of motion.

Marriott, for Abdul Rahim, opposed the application:—The only section of the Civil Procedure Code that gives power to the court to add a defendant to a suit is Sec. 73, which enacts that if *at any hearing of a suit* it appears to the court that all parties who claim an interest in the subject-matter of the suit have not been made parties to it, the court may adjourn the hearing and direct such persons to be made parties. The hearing of the suit is now over, a final decree has been made, and the section has, therefore, no application. There would be no advantage in adding a defendant at this stage of the proceedings, as he could not be affected by the decree already passed in his absence. The proceedings must, therefore, all be commenced afresh. [BAYLEY, J., referred to Sec. 35, where the language used is different. A plaintiff out of British India may be compelled to give security “in any stage of the suit.”] The wording of that section shows that the power of adding a party is intentionally confined to the hearing. He cited *Muthayammal v. Tirumala Gaudan* (a), *Kaj Kishore Dossee v. Budden Chunder* (b), *Ridhnath Sahoy v. Gopee Sahoo* (c).

(a) 4 Mad. H. C. Rep. 22. (b) 6 Calc. W. Rep., Civ. R. 298.

(c) 14 *Ibid.*, Civ. R. 90.

Mayhew, for the defendants other than the Advocate General, also opposed the application.

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The Acting Advocate General, in reply : — A defendant may be added at any time prior to final decree—that is, final decree on appeal: *Krishnábái v. Sonubái* (d). The only difficulty here arises from the anomalous position of the Commissioner, an officer not contemplated by the Code, to whom the court delegates a portion of its functions. What is going on before the Commissioner is, in contemplation of law, going on before the court. He is not acting ministerially only. He has judicial functions to exercise. The directions that he is carrying out would in the Mofussil be carried out by the court at the hearing. The hearing before Sir Joseph Arnould was in fact a portion of the hearing of the suit, and an interlocutory decree only has been made. The court has, therefore, I submit, power to make Abdul Rahim a party to the suit, for he claims an interest in its subject-matter, and is likely to be affected by its result. [BAYLEY, J. :—What is there here for me to adjourn?] Your Lordship can stay or adjourn proceedings before the Commissioner, and fix a day for the hearing of the suit in court. [BAYLEY, J. :—If I grant this application, the proceedings will have to be commenced *de novo*.] Yes, in theory, but in fact there will be no difficulty in that respect. The matter will at once be sent back to the Commissioner, and he will then proceed with the sale.

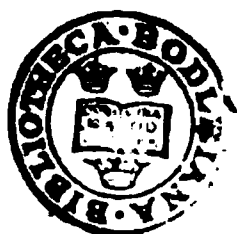
Cur. adv. vult.

BAYLEY, J. (after stating the above facts and proceedings continued): —Now in these circumstances the present application is made by the Advocate General, under Sec. 73 of the Code of Civil Procedure, to have Abdul Rahim made a party to this suit. That section provides that “if it appear to the Court, at any hearing of a suit, that all the persons who may be entitled to, or who claim some share or interest in, the subject-matter of the suit, and who may be likely to be affected by the result, have not been made parties to the suit,

(d) 2 Bom. H. C. Rep. 310 (2nd ed.).

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the Court may adjourn the hearing of the suit to a future day, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be." If the words of the section I have just read are to be construed strictly and in a literal sense, the present application would probably be unsuccessful, as, speaking strictly, the proceedings which are now being carried on before Mr. Fox, the Commissioner of this court, can hardly be described as a hearing of this suit. The suit has already been heard, at least partially, by Sir Joseph Arnould, and a decretal order has been made in it. Having for this reason some doubts as to my power to make the order asked for at the present stage of the proceedings, and as this is a question of practice in which it is desirable that there should be uniformity, I consulted with the Chief Justice upon the subject, and he authorises me to state that he concurs with me in thinking that the words of Sec. 73 ought to receive a liberal interpretation, so as to carry out the spirit and intention of the Code, seeing that it is now applied to suits brought on the Original Jurisdiction side of the High Court, where the practice and machinery inherited from the Supreme Court are entirely different from the practice and machinery of the Courts in the Mofussil, for the regulation of the proceedings in which that Code was originally enacted. This section of the Code must, in my opinion, be construed liberally, and when necessary adapted *cy près* to the requirements of this court on its ordinary Original Jurisdiction side.



That such adaptation may be sometimes necessary is indicated by the marked distinction between the mode in which the procedure of the High Court is regulated by the two Charters under which it was respectively established and continued, as will be seen on referring to Cl. 37 of the Original Letters Patent and comparing its provisions with those of the corresponding section (Cl. 37) of the existing Letters Patent.

The original Letters Patent of 1862 provided that the proceedings in Civil suits of every description between party and party brought in the High Court should be regulated by the Code of Civil Procedure (Act VIII. of 1859), and by

such further or other enactments of the Governor General in Council in relation to civil procedure as were then in force.

The existing Letters Patent of 1865 provide that it shall be lawful for the High Court of Judicature at Bombay from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases * * * Provided that the said High Court shall be guided, in making such rules and orders, as far as possible by the provisions of the Code of Civil Procedure, and the provisions of any law which has been made amending or altering the same by competent legislative authority for India. The inapplicability of the Code in its entirety to the High Court procedure was thus in 1865 expressly recognised, and the Judges were given power to modify its provisions so as to make them applicable to the state of things to which they were to be applied. Bearing this end in view, and considering that the suit is, to a certain extent, still being heard by the court's delegate, and that no final decree can be made until after his report has been submitted to the court, I think I must hold the words "at any hearing of a suit" to include such a case as the present, and read them as equivalent to "in any stage of a suit," the words used in Sec. 35, to which I drew attention during the course of the argument. A court sometimes feels compelled to construe the words even of an Act of Parliament in a sense different from the literal one, as for instance in the case of *H. H. Ruckmaboye v. Lalloobhoy Mottichund (c)*, where the Lords of the Privy Council, after two arguments, and in a very elaborate judgment delivered by Sir John Jervis, C.J., held—reversing the decision of Sir Erskine Perry, C.J., and Yardley, J., in the Supreme Court of Bombay upon this and other points—that the words in the Statute of Limitations 21 Jac. I., c. 16, s. 7, "beyond the seas" were synonymous in legal import with the words "out of the realm" or "out of the land" or "out of the territories," and were not to be construed literally. I think, therefore, and so does the Chief Justice (who is not, however, responsible for the above reasoning), that the court has power to make

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Abdul Rahim a party, and I order him to be made a party as defendant. He must of course be summoned, and have an opportunity of being heard. The summons will issue forthwith, returnable on the first day of August next, on which day the cause may be set down for hearing. A written statement must be filed by Abdul Rahim within four weeks from the service of the summons upon him. I order the costs of all parties who have appeared on this application to be paid out of the estate.

Attorney for the plaintiff: *Shámráv Pándurang.*

Attorney for the Advocate General: *R. V. Hearn*, Government Solicitor.

Attorney for Abdul Rahim: *H. E. Hope.*

Suit No. 347 of 1870.

June 27.

KHIMJI CHATURBHUI *et al.* *Plaintiffs.*

Sir CHARLES FORBES, Baronet, *et al.* ... *Defendants.*

Jurisdiction—Cause of Action—Whole Cause of Action—Carrying on of Business—Letters Patent of High Court, Cl. 12.

The defendants resided and carried on business in London, and employed Sir C. F. and Co. as their commission agents in Bombay. The plaintiffs at Bombay executed a power of attorney in favour of the defendants to enable them to sue in England for certain money due to the plaintiffs, and handed the power of attorney to Sir C. F. and Co., who undertook to forward it to the defendants in London, and that the defendants should endeavour to recover the money so due to the plaintiffs. The defendants recovered the money in England for the plaintiffs, but did not transmit it to the plaintiffs in Bombay.

In a suit brought by the plaintiffs to recover the money so received by the defendants, *it was held* that the cause of action had not arisen wholly in Bombay, and that the High Court, under Cl. 12 of its Letters Patent had no jurisdiction to entertain the claim, the leave of the court to file the suit not having been obtained.

Where an English firm, upon the usual terms, employs a Bombay firm to act as the English firm's commission agents in Bombay, such English firm does not thereby render itself liable to be sued in the High Court of Bombay, as it does not carry on business within the local jurisdiction of such High Court within the meaning of the above clause of the Letters Patent.

THE facts of this case are fully set out in the judgment of the court. It was tried by BAYLEY, J., in a Division Court, on the 8th of June 1871 and subsequent days.

Anstey and Mayhew for the plaintiffs.

Marriott and Jones Q. Pigot for the defendants.

Cur. adv. vult.

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27th June 1871. BAYLEY, J.:—This suit was originally brought against Sir Charles Forbes, Baronet, and George Stewart Forbes, residing in Europe; Henry Forman, residing at Malabar Hill, in Bombay; Andrew John McDonald and Henry Randall Cormack, residing in Rampart Row, within the Fort of Bombay; and who were described in the plaint as carrying on trade and business in Bombay in partnership under the name, style, and firm of Sir Charles Forbes and Co.

The plaint was filed on the 30th of April 1870.

The suit being in effect brought to recover moneys received in England by the firm of Messrs. Forbes, Forbes, and Co., which carried on business in London, and the defendants, Sir Charles Forbes and Co., having filed their written statement on the 1st of July 1870, the plaintiffs became aware that the members of the firm of Forbes, Forbes, and Co., in England, with the exception of Sir Charles Forbes, were distinct from the members of the firm of Sir Charles Forbes and Co., in Bombay; and an order was obtained from myself, then the sitting Judge in chambers, dated the 28th of February 1871 (exhibit No. 5), by which, after hearing Mr. Anstey for the plaintiffs and Mr. Langley for the defendants, leave was given to the plaintiffs to amend the plaint by substituting all the partners in the firm of Messrs. Forbes, Forbes, and Co., of London, as defendants, carrying on business at Bombay by means of the firm of Sir Charles Forbes and Co., as their attorneys or agents, in place of Sir Charles Forbes and Co., the original defendants; and it was ordered that the summons be amended accordingly, that the hearing be postponed until the 28th of April then next, and that the original defendants' costs of, or occasioned by, the amendment be paid by the plaintiffs.

The substituted defendants, Messrs. Forbes, Forbes, and Co., of London, having, on the 24th of April 1871, filed their written statement, the suit came on for hearing before me on

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the 8th of June instant, when, Mr. Anstey and Mr. Mayhew appearing for the plaintiffs, and Mr. Marriott and Mr. Jones Q. Pigot for the defendants, issues were framed—

(1). Whether, having regard to Cl. 12 of the Amended Letters Patent dated the 28th of December 1865, this court has jurisdiction to entertain this suit.

[The other issues (which were raised for the purpose of showing that the defendants were justified in retaining the amount claimed in this suit, by reason of the plaintiffs being indebted in a similar amount to the defendants on certain other transactions), are not material for the purpose of this report.]

It was contended on behalf of Messrs. Forbes, Forbes, and Co., of London, the sole defendants now on the record, and whom I shall hereafter designate as the defendants, that the cause of action arose in London; that the defendants did not dwell, or carry on business, or personally work for gain within the local limits of the ordinary original jurisdiction of the High Court of Bombay; and, consequently, that this court had no jurisdiction to try and determine the suit.

It being considered difficult, if not impossible, to confine the evidence exclusively to the question of jurisdiction, witnesses were examined on both sides, and the case was fully heard on the merits.

I will consider first the question of jurisdiction.

Cl. 12 of the existing Letters Patent of the 28th of December 1865, by which the original jurisdiction as to suits was given, and upon which this question exclusively turns, is as follows:—“ And we do further ordain that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High

Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, in which the debt, or damage, or value of property sued for, does not exceed one hundred rupees."

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This section, it will be noticed, differs from the corresponding section (s. 12) in the original Letters Patent constituting the High Court of Bombay, bearing date the 26th of June 1862, in one important particular, namely, that whereas in the Letters Patent of 1862 jurisdiction was given "if the cause of action shall have arisen" within the local limits of the ordinary original jurisdiction of the said High Court, in the amended Letters Patent of 1865, by which the Letters Patent of 1862 were revoked, jurisdiction is given "if the cause of action shall have arisen, *either wholly, or, in case the leave of the court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court.*"

Consequently, where the leave of the court has not been first obtained, this court has no jurisdiction to try and determine a suit when (the other portions of Cl. 12 being inapplicable) only a part of the cause of action has arisen within the local limits, *i. e.*, within what until recently was called the "Town and Island of Bombay" and the Harbour of Bombay.

The previous leave of the court not having been obtained before the present suit was filed, the first question is whether the cause of action arose wholly within its local limits.

I am of opinion that it did not.

The suit is brought, as appears from the particulars of demand, to recover Rs. 8,667-7-9, made up as follows, namely, Rs. 10,647-9-1, alleged to be a balance of the amount recovered by the defendants, Messrs. Forbes, Forbes, and Co., of London, from Messrs. Shand and Co., after deducting therefrom commission due to the defendants, solicitors' charges, and postages, &c., less Rs. 1,980-1-4, alleged to be

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v.
 Sir CHARLES It appeared from the evidence that in April 1867 the
 FORBES, Bart., plaintiffs consigned through Messrs. W. Sim and Co., of
et al. Bombay, to Messrs. Shand and Co., of London and Liverpool,
 183 bales of cotton by the "Abel Tasman," and insured
 such cotton to its full value. The "Abel Tasman" sailed
 from Bombay on the 5th of April 1867. About four days
 afterwards she struck on a reef down the coast, and filled
 and sank on the 12th of that month.

The value of such consignment was recovered by Messrs. Shand and Co. from the underwriters, and Messrs. Shand and Co., being creditors of Messrs. W. Sim and Co. to a large amount, claimed to retain the moneys they had so received, and to set the same off against Messrs. W. Sim and Co.'s debts to themselves.

The plaintiffs, in Bombay, being unable to get the moneys so obtained for them by Shand and Co., and had and received by Shand and Co. in England to the use of the plaintiffs, Khimji Chaturbhuj, one of the plaintiffs, and acting for himself and his copartners, after applying unsuccessfully to other firms in Bombay to take up the matter, came, in the middle of May 1868, to the firm of Sir Charles Forbes and Co. in Bombay, saw Mr. Macdonald, a member of that firm, and begged his firm to undertake to recover the moneys so received by Shand and Co. from the underwriters in respect to the consignment of 183 bales of cotton which had been sunk in the "Abel Tasman" in April 1867.

Mr. Macdonald, on looking over the documents brought by Khimji, considered that his firm, the plaintiffs in this suit, had a good claim on Shand and Co., provided Shand and Co. had no claim against the plaintiffs for previous deficiencies, and he told Khimji Chaturbhuj that if the plaintiffs got a power of attorney prepared, his (Mr. Macdonald's) firm would forward the documents to the defendants in London, and that the defendants would try and recover the money from Shand and Co.

A power of attorney was accordingly executed by the plaintiffs, bearing date the 23rd of May 1868, by which the plaintiffs constituted the defendants, the partners of Forbes, Forbes, and Co., of London, their attorneys and agents for the plaintiffs, and in the plaintiffs' names, or in the name of their firm, or otherwise, but for the plaintiffs' use, to ask, demand, sue for, recover, and receive of and from the firm of Messrs. Shand and Co., of London, merchants, and from the several partners therein, all moneys due to the plaintiffs or to their firm in respect of the surplus proceeds of 183 bales of cotton consigned by the plaintiffs, in or about the month of April 1867, by the ship "Abel Tasman," from Bombay to Liverpool, with power to adjust all accounts between the plaintiffs and Shand and Co. in respect of the said claim, and to compromise and conclude all differences then existing, or which might thereafter arise in the settlement of the said claim, between the plaintiffs and the said firm of Shand and Co. The power contains the usual clauses.

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Mr. Macdonald, in his cross-examination by Mr. Mayhew, said that the defendants (*i. e.*, Forbes, Forbes, and Co.) filed a suit in England against Shand and Co.; that the law proceedings in England took nearly two years; and that the amount recovered by the defendants was the result of a compromise, about £70 being given up.

The amount so recovered, which was not disputed by the plaintiffs at the hearing, is alleged to have been received on the 9th of March 1870, and was thus entered in Schedule No. 1 to the present defendants' written statement, which was filed on the 24th of April 1871.

"1870.

March 9—Amount recovered under process at

law from Messrs. Shand & Co.	£1,100	0	0
Less Commission at 2½ per cent.. ,	27	10	0
	<hr/>		
	£ 1,072	10	0"
	<hr/>		

which, with some deductions, is the money claimed in the present suit.

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The claim in this suit, therefore, is not a partnership claim, as was the case of *Lutchmee Ohund v. Zorawur Mull* (a), decided by the Lords of the Judicial Committee of the Privy Council upon the extent of the jurisdiction of the Zillá Court at A'grá under the Bengal Reg. XI. of 1803, but for moneys recovered and received by the defendants in England from Shand and Co. in England through the instrumentality of a court of law in England; and if, as alleged by the plaintiffs, the defendants have improperly refused to remit those moneys to Bombay, it is to my mind clear that the "cause of action," assuming the plaintiffs to have one, and which I take to mean the contract and the breach (see *DeSouza v. Coles* [b]), cannot be said, in the language of Cl. 12 of the existing Letters Patent of the High Court, to have arisen wholly within the local limits of the ordinary original jurisdiction of the High Court of Bombay.

Moreover it must always be borne in mind that the High Courts of Judicature in India have no inherent jurisdiction of their own, as have the superior courts of England, but only such jurisdiction as Her Majesty, under the powers conferred upon her by the Imperial Stat. 24 & 25 Vict., c. 104, "an Act for establishing High Courts of Judicature in India," which received the Royal assent on the 6th of August 1861, has been graciously pleased to grant unto them. The words of the Letters Patent are not to be forced or strained for the mere purpose of conferring jurisdiction.

Next, did the defendants in this suit, Messrs. Forbes, Forbes, and Co., of London, "at the time of the commencement of the suit, dwell, or carry on business, or personally work for gain within such limits?"

There was no evidence to show that any of the partners in the defendants' firm, who are all described in the amended plaint as "of London, merchants," ever were in Bombay at all, except Sir Charles Forbes, Baronet, and the only evidence as to his residing in Bombay was given by Mr.

(a) 8 Moo. Ind. App. 291.

(b) 3 Mad. H. C. Rep. 384.

Macdonald, who stated that he believed Sir Charles Forbes had not been in Bombay since 1803.

None of the defendants, therefore, when the plaint in this suit was filed, on the 30th of April 1870, dwelt, or personally worked for gain, within the local limits of this court.

Did they "carry on business" here within the meaning of those words in the existing Letters Patent?

Mr. Mayhew, on behalf of the plaintiffs, contended that they did; whilst Mr. Marriott, for the defendants, argued strenuously that they did not.

The amended plaint, in obedience to the provisions of Sec. 26 of the Code of Civil Procedure (Act VIII. of 1859), which states what particulars are to be given in the plaint, and which enacts that the plaint shall (*inter alia*) contain the following particulars, namely, "The name, description, and place of abode of the defendant, so far as they can be ascertained," describes the four defendants as "of London, merchants, but carrying on their trade as merchants at Bombay by means of their attorneys or agents, Sir Charles Forbes and Co., an European firm of merchants carrying on trade in Rampart Row, within the Fort of Bombay."

The plaintiffs gave no direct evidence in support of this very material allegation. Mr. Macdonald, who said that he came to Bombay for the first time in November 1865, the month and year in which the present firm of Sir Charles Forbes and Co. was established in Bombay, himself a partner in such firm of Sir Charles Forbes and Co., and who would doubtless know far more about the nature and character of the transactions which the defendants (*i. e.*, Forbes, Forbes, and Co., of London) had in Bombay, stated at the commencement of his examination-in-chief as follows:—

"The firm of Forbes, Forbes, and Co., of London, has no branch in Bombay, and does not carry on business in Bombay. It is quite distinct from the firm of Sir Charles Forbes and Co. All the partners in each firm are different except Sir Charles Forbes, who is a partner in both. None of the members of Forbes, Forbes, and Co. reside in Bombay.

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Sir Charles Forbes resides in the neighbourhood of London, and in the summer he goes to his castle in Aberdeenshire."

In cross-examination he said: "Forbes, Forbes, and Co. do not do any business whatever in Bombay. If they have business to do we act for them. Forbes, Forbes, and Co. are our London correspondents, and we are their Bombay ones." Then, in allusion to certain re-drafts drawn by the defendants upon the plaintiffs in relation to some cotton consignments previously made by the plaintiffs, and which the defendants had in 1866 and 1867 sent out to Bombay to Sir Charles Forbes and Co. for collection, he says: "The business of the original re-drafts was the business of Forbes, Forbes, and Co., done in Bombay through our firm. We only acted as Forbes, Forbes, and Co.'s agents in the matter of the re-drafts." And in re-examination he said: "We charge Forbes, Forbes, and Co. commission for the business we do for them in Bombay—agency commission, just as for other constituents. They charge us commission for the business they transact for us in England. The share of loss sustained in consignments to England is borne by Sir Charles Forbes and Co. as well as Forbes, Forbes, and Co. That is purely a commission business." And in answer to a question put by the court Mr. Macdonald said: "In the matter of the original consignments, as well as in that of recovering the moneys from Shand and Co., our firm acted merely as the agents of Forbes, Forbes, and Co."

This evidence, which was not met, or even attempted to be denied, by any called on behalf of the plaintiffs, shows that the defendants cannot be considered as carrying on business in Bombay in the plain common-sense acceptation of the words. They have no house or establishment, or any clerks or servants, in Bombay. What business they do get done here they transact through their agents, namely, the Bombay firm of Sir Charles Forbes and Co., paying them a commission for that purpose.

Mr. Marriot relied on two cases decided by the High Court of Madras in 1863 and in 1866—*Subbaráya Mudali and*

others v. The Government and Cunliffe (c) and *Ohinnammál v. Talukannatammál and others (d)*—where the court held that the words “carry on business” in Cl. 12 of the Letters Patent of the High Court of Madras, and which are similar to the Letters Patent of the High Court of Bombay, implied a personal and regular attendance to business within the local limits.

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In the first of those cases Sir Colley Scotland, Chief Justice, in delivering the judgment of the court after time taken to consider, said (p. 293): “Now the alternatives on which the jurisdiction of the court is alike made to depend are that the defendant should ‘dwell, or carry on business, or personally work for gain, within the local limits,’ and we think that carrying on business by the defendant personally is what is meant by the clause. Dwelling is a personal act, and the working for gain is expressly required to be personal, and we think a personal attendance to business was intended. It could not have been intended that the carrying on of business was to be taken in its most general sense. If that were so, a man living at Calcutta or Bombay, or any other distant place, and there carrying on in person his business, might, because of his carrying on business here by a *gumástá*, clerk, or agent, or by occasional visits only, be sued in this court at the discretion of the plaintiff, without any regard to the place where the cause of action arose. This evident inconvenience and hardship could not have been intended by the Letters Patent; the intention must have been that the words “carry on business” should be taken with some limits; and we think that when read with the other words of the clause the proper construction is that, to give jurisdiction, there must be the regular carrying on of business by the defendant personally within the local limits. We may refer on this point to the case of *Mitchell v. Bender*, 23 Law Journ. Q. B. 279.”

In the second of those Madras cases, and which was heard before the Chief Justice, Sir Colley Scotland (3 Mad. H. C. Rep. 146), it appeared from the evidence that a trader in the

(c) 1 Mad. H. C. Rep. 286. (d) 3 *Ibid.* 146.

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Mofussil habitually sent grain to Madras for sale by a general agent for the sale of goods sent to him by different persons. On some occasions the trader himself accompanied the loaded "bandies." After his death the first defendant, his widow, carried on his business. The grain so sent for sale was never stored, but remained in the "bandies" until sold by the agent, who acted as broker, the purchasers paying his brokerage commission, and the consignors of the grain paying nothing. The Chief Justice held that the first defendant did not "carry on business" within the jurisdiction of the High Court of Madras within the meaning of Sec. 12 of the Letters Patent.

In the course of his judgment he said (p. 147): "It could not have been intended (as observed in the judgment of the Court in 1 Madras High Court Reports 286) that the words 'carry on business' were to be understood in their most general sense. Giving proper effect to the other words of the provision, the section, I think, requires that the defendant should, at the time of the commencement of the suit, carry on within the local limits of the court's jurisdiction some independent regular business in person, as in the case of *Mitchell v. Bender* (23 Law Journ., Q. B. 273), or at an office or other fixed place of business (see *Rolfe v. Learmouth*, 14 Q. B. 196), either personally, or by clerks or servants employed by the defendant, and conducting the business under his control, and in his individual or partnership name.

"Here the defendant had no place of business in Madras, and the sales were effected by Narayana in his independent trade or business of a general broker, for a commission received from the purchasers. In *Corbett v. The General Steam Navigation Company* (4 Hurl. & Norman 482), and in *Minor v. The London & N. W. R. Co.* (1 C. B., N. S., 325), it was held that the defendants in those cases did not carry on business, within the meaning of the County Courts Act, at a place where they employed general agents to act on their behalf; and in the present case I think Narayana is the only person who can be said to have carried on business within the meaning of the section in question in respect of the paddy sent to him for sale. For these reasons I am of opinion that

“the court has no jurisdiction to entertain the suit”; and he, accordingly, dismissed it with costs.

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The High Court of Bombay in the interval between those two cases, namely, in February 1865, had considered the effect of the words “carry on business” in the jurisdiction clause of the original Letters Patent (dated 26th June 1862) of the Bombay High Court. The question was brought before the Full Court by Mr. Justice Couch, who declined in Chambers to make an order for a commission to examine witnesses until the opinion of a court of two Judges had been obtained on the point of jurisdiction. After lengthened argument, and time taken to consider, Sir Matthew Sausse, C.J., delivered the judgment of the court, and, expressly guarding themselves from expressing any opinion as to whether the first above-cited case in the Madras High Court was good law or not, held that a defendant does not “carry on business” so as to come within Cl. 12 of such Letters Patent, and render himself subject to the ordinary original civil jurisdiction of the High Court of Bombay, though he may have an agent at Bombay for certain purposes connected with his business, where that which is the essential ingredient in his business does not take place within the local limits of the jurisdiction of the court, and, therefore, that the defendant, who was a retail dealer in European goods, and carrying on business at upcountry stations in the Panjáb and Central India, was not within the jurisdiction of the High Court of Bombay on the ground that he had an agent in Bombay for the purpose of purchasing and forwarding goods to be used in his trade: *Frámji Kávasji Marker v. Hormasji Kávasji Marker* (e).

That case certainly appears to me to be an authority against the present plaintiffs.

The plaintiffs’ contention as to the proper construction to be placed upon Cl. 12 of the Letters Patent certainly derives no countenance from the opinion expressed by Her Majesty’s Secretary of State for India in the letter dated 14th May 1862 to the Governor General of India in Council accom-

(e) 1 Bom. H. C. Rep. 220.

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panying the original Letters Patent of the High Court to be established in Bengal, a letter which was printed in 1862 with the Act of Parliament and the Letters Patent of the High Court of Bombay in the little book containing the Rules of the Bombay High Court.

In para. 16 of that letter, Sir Charles Wood said : “ As it is very desirable that every suit should be instituted in the court of the district in which the property forming the subject of dispute is situated, or in which the cause of action has its origin, or in which the defendant resides or carries on business, the jurisdiction hitherto exercised by the Supreme Court (on the ground of constructive inhabitancy or otherwise) over persons and property beyond the local limits of the Presidency Town, but within the limits of the Presidency or Division subject to the authority of the High Court, has not been vested in the High Court.” And at para. 20 he said : “ As already observed, the effect of Clause 12 will be to confine the ordinary original civil jurisdiction of the High Court within narrower limits than the civil jurisdiction exercised by the Supreme Court.”

This letter, of course, affords no assistance in the interpretation to be put upon Cl. 12 of the Letters Patent, and I merely notice it to show that the framer of the Letters Patent of 1862 stated he had no intention of extending, or of even continuing, the old Supreme Court jurisdiction by way of constructive inhabitancy or residence.

I am of course aware of a decision by the late and the present Chief Justices of Bombay—*Bombay Coast and River Steam Navigation Company v. René Heleux* (f)—where it was held that a person who had sued in a High Court for damages caused by a collision at sea, and out of the jurisdiction of the High Court, subjected himself to a cross-suit for damages caused by the same collision, although himself residing out of the jurisdiction of the court ; and an order made by Sir Joseph Arnould rejecting under such circumstances a plaint for want of jurisdiction was set aside on appeal.

(f) 4 Bom. H. C. Rep., O. C. J. 149.

It had been previously held at Calcutta by Sir Barnes Peacock, C.J., and Morgan, J., in *Feda Hossim v. Syedoonissa* (g) that a suit to enforce the specific performance of an agreement for the compromise of a former suit instituted in the late Supreme Court in Calcutta would not lie in the High Court in Calcutta where it appeared that the defendant dwelt out of the jurisdiction.

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It was contended, however, on behalf of the plaintiffs, that the defendants, by accepting this alleged mandate or trust from Bombay, rendered themselves liable to account in Bombay, and thereby gave this court jurisdiction to entertain the present suit.

No doubt the defendants are liable to account to the plaintiffs for the moneys received by them in England. They admit having received the net sum of £1,072 10s. on the 9th of March 1870 from Shand and Co., and, in part payment thereof, they, by their bill of exchange dated 11th March 1870 (exhibit No. 3) drawn by them on their Bombay agents, Sir Charles Forbes and Co., requested the latter to pay on demand to themselves, Sir Charles Forbes and Co., on account of the plaintiffs, Rs. 3,978-4-1, which sum Sir Charles Forbes and Co., the original defendants in this suit, brought into court on the 1st of July 1870, the day they filed their written statement.

That sum was tendered to the plaintiffs before this action was commenced, and, as was stated by their counsel at the hearing, was taken out of court by them on the 5th of June 1871.

The present defendants, Forbes, Forbes, and Co., having claims against the plaintiffs in respect of re-drafts drawn by them against the plaintiffs in respect of consignments of cotton in former years, claim to hold the balance of the said sum of £1,072 10s. in reduction of such claim.

Such re-drafts, however, and the compromise which, after a suit had been filed in the High Court of Bombay in respect thereof, was, on the 29th of April 1867, made between Mr.

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Macdonald, whose firm was acting as agents of the defendants, on the one part, and Khimji Chaturbhuj, who was acting for himself and his copartners, the plaintiffs in this suit, on the other part, had reference to matters which were in no way connected with the moneys received from Shand and Co. sought to be recovered in the present suit. The alleged liability of the defendants in the present suit arises from the implied contract between the parties that the moneys were received by the defendants in England for the use and at the request of the plaintiffs. See *Dhanraj v. Gobindaram (h)*, coram Peacock, C.J., Norman and Markby, JJ.—a decision in 1868 upon the words “cause of action” in Cl. 12 of the Amended Letters Patent of the High Court at Calcutta dated 28th December 1865. * *

For these reasons I am of opinion that, having regard to Cl. 12 of the Amended Letters Patent, dated the 28th of December 1865, this court has no jurisdiction to entertain this suit; and I, accordingly, record a finding upon the first issue to that effect and for the defendants.

His Lordship, however, went into the merits of the case, and found all the issues in favour of the defendants.

Decree for the defendants with costs.

Attorney for the plaintiffs : *Shámráv Pándurang*.

Attorneys for the defendants : *Rimington, Hore, & Langley*.

(h) 1 Beng. L. Rep., O. J. 76.

In re THE MERCANTILE CREDIT AND FINANCIAL ASSOCIATION (LIMITED).

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July 7.

Bábá Sáheb Dámáskar's Case.

Winding up—Insolvency—Personal Discharge—Liability of Insolvent to pay subsequent Calls—Indian Companies' Act (X. of 1866, Secs. 78 and 100)—Act 11 & 12 Vict., c. 21, s. 47.

An insolvent, a holder of shares in a joint stock company, on the 21st of May 1866, obtained his personal discharge under Sec. 47 of the Indian Insolvent Debtors' Act, but his name still continued on the register of the company, the Official Assignee not having elected to take the shares. The company was subsequently (on the 13th of April 1867) ordered to be wound up.

Held that the insolvent's liability to pay calls on the shares still continued, notwithstanding his personal discharge.

BÁBA' SA'HEB DAMA'SKAR, on the 2nd of April 1866, applied for, and on the 21st day of May 1866 obtained, his personal discharge under Sec. 47 of the Act for the relief of Insolvent Debtors in India.

The order of discharge directed that the person of the said Bábá Sáheb should, until further order to the contrary, be protected from being arrested for and in respect of all the debts mentioned or referred to in his schedule, and the judgment should be entered up against the Official Assignee for the amount of the debts stated in the schedule.

Previously to his petitioning the Insolvent Court for relief, and at the time of obtaining his discharge, Bábá Sáheb was the registered holder of twenty shares in the Mercantile Credit and Financial Association (Limited), a company registered under Act XIX. of 1857. No mention was made of these shares in the schedule of Bábá Sáheb.

On the 13th day of April 1867 the Mercantile Credit and Financial Association was ordered to be wound up by the court under Act X. of 1866 (on a petition for that purpose presented on the 16th of March 1867), and the name of Bábá Sáheb was subsequently placed upon the list of contributories in respect of twenty shares.

On the 22nd of July 1867 a call of Rs. 150 per share was made upon the contributories of the Association, payable as

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to Rs. 75 on the 5th of August, and as to the remaining Rs. 75 on the 1st of November following.

On the 20th of December 1867, Mr. Bendir (the Official Liquidator of the Association at that time) wrote to the Official Assignee claiming to rank against the estate of Bábá Sáheb in respect of the call that had been made on the shares standing in his name, and the Official Assignee, in the usual course, registered the claim on Bábá Sáheb's estate, but no further steps were taken in the matter, and no payment was made by the Official Assignee. No assets of the insolvent were collected by the Official Assignee.

According to the practice of the office of the Official Assignee, no claim is ever paid unless and until it is verified by the affidavit of the claimant.

On the 20th of March 1871, a summons in Chambers was taken out by Mr. Punnett, the Official Liquidator of the Association, calling on Bábá Sáheb to show cause why execution should not issue against him on the call-order of the 22nd of July 1867.

It was admitted that no steps had been taken by the Official Assignee to take over the shares in question, or to have them transferred into his own name.

The summons was adjourned into court, and came on for argument before BAYLEY, J., on the 22nd of June 1871.

Ferguson, in support of the summons :—Waiving all technical difficulties that might be urged against allowing Bábá Sáheb in a proceeding of the sort to appeal in effect from the order placing his name on the list of the contributories of the Association, I contend that he is liable, notwithstanding his having obtained his discharge in insolvency, to pay this call. (I.) He is not discharged by the provisions of the Insolvent Act, for a personal discharge only relieves from responsibility in respect of the debts mentioned in the schedule, and these shares do not appear in Bábá Sáheb's schedule. (II.) The property in the shares remained in the insolvent notwithstanding his insolvency, and he continued the holder of them. Property of this nature does not pass

to the Assignee until he signifies his acceptance of it: *Sayles v. Blane* (a); *Midland Great Western Railway Company v. Gordon* (b). In general nothing passes to the Assignee but what is beneficial. Here there has been no election or acceptance: *Boorman v. Nash* (c); *Herbert v. Sayer* (d). The claim is not barred by the discharge under Sec. 48 of the Insolvent Act. It has been so held in *Parker v. Ince* (e), which was decided under a similar section, 6 Geo. IV., c. 16, ss. 51 and 56: *South Staffordshire Railway Company v. Burnside* (f); *The General Discount Company v. Stokes* (g). Lastly, the claim is not barred by Secs. 98 and 100 of Act X. of 1866. It has been so decided in several cases decided under the corresponding sections of the English Act, ss. 75 and 77 of 25 & 26 Vict., c. 89: *Martin's Patent Anchor Company (Limited) v. Morton* (h); *Hastie's Case* (i); *Financial Corporation v. Lawrence* (j).

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Marriott, contra:—The Liquidator has elected to proceed against the estate; the insolvent is thus discharged, and the Official Assignee, by registering the claim, has elected to take the shares. By Sec. 6 of the Insolvent Debtors' Act, all the property of the insolvent vests in the Official Assignee when the schedule is filed. If this claim is not inserted in the schedule it can now be amended. But it is not necessary for me to rely upon the Insolvent Act, for Secs. 98 and 100 of the Companies' Act completely protect the insolvent, and provide for debts not entered in the schedule. The cases cited are not in point, for here the insolvency of Bábá Sáheb is still going on, as he has not obtained his final discharge. The winding up and the insolvency are contemporaneous.

Ferguson in reply.

Cur. adv. vult.

(a) 19 L. J., Q. B. 19. (b) 16 M. & W. 804.

(c) 9 B. & C. 145. (d) 5 Q. B. 965. (e) 4 H. & N. 53.

(f) 5 Ex. 129. (g) 17 C. B., N. S., 765.

(h) Law Rep. 3, Q. B. 306. (i) Law Rep. 7, Eq. 3.

(j) Law Rep., 4 C. P. 731.

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7th July 1871. BAYLEY, J. (after stating the facts as given above, proceeded):—Upon this state of facts, and it being admitted that Bábá Sáheb's name still remains on the list of contributories of the Association, the question is whether Bábá Sáheb is now liable to payment of the call made on the 22nd of July 1867, notwithstanding that he has obtained his order of discharge under Sec. 47 of the Insolvent Debtors' Act.

In order to answer that question it becomes necessary to consider three points:—1st, Is Bábá Sáheb now the holder of twenty shares in the Financial Association; 2nd, If he is, is the Association barred from making a claim upon him on the ground that the call was proveable under Sec. 48 of the Insolvent Debtors' Act; and 3rd, Do Secs. 98 and 100 of the Indian Companies' Act (Act X. of 1866), which have been relied upon, afford any defence to this application.

The two first of the above questions are so closely blended with one another that I proceed to consider them together. Sec. 16 of Act X. of 1866 enacts that the Articles of Association of a company "when registered shall bind the Company and the members thereof to the same extent as if each member had subscribed his name thereto, and there were in such Articles contained a covenant on the part of himself, his heirs, &c., to conform to all the regulations contained in such Articles, subject to the provisions of this Act. All moneys payable by any member to the company in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company." Bábá Sáheb, at the time of his insolvency, was the registered holder of twenty shares, and, therefore, in respect of unpaid calls fell within the meaning of this section. The nature of the liability of a shareholder to pay calls is well stated in the case of *The South Staffordshire Railway Company v. Burnside* (k). The court there says: "The contract on which the shareholder's obligation is founded is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required

(k) 5 Exch. 129.

from himself and all the other shareholders from time to time, not exceeding a certain sum, and regulated by the wants of the company. At the time of the bankruptcy it was uncertain what the sum would be which the defendant would be called upon to pay, and no certain debt was then contracted. * * * However, it does not seem to be necessary that it should be capable of valuation; therefore, we do not decide that the case does not fall within the 56th section on that ground, but on the other ground of the uncertainty of the claim we are of opinion it does not. The situation of the bankrupt in this respect bears a close resemblance to that of a lessee who has become bankrupt, who continues liable after his certificate to the payment of rent accruing due subsequently to the bankruptcy. The contract to pay rent *in futuro* is not a debt contracted at the time of the bankruptcy, and could not be proved under the fiat against him."

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The liability to pay calls is again clearly stated by Chief Justice Erle in *The General Discount Company v. Stokes* (l). He there says: "Then was the liability of this shareholder to be called upon to contribute to the funds of the company a liability to pay money upon a contingency within the meaning of this provision? * * * Where a party is a holder of shares in a joint stock company, his liability to pay money depends upon more contingencies than one—there may, or may not, be a call made; and the bankrupt might not be the holder of the shares when a call is made. There may be no existing liability at the time of the bankruptcy, but a liability may arise from the concurrence of those two contingencies. * * * It must be a claim depending upon whether or not the company is in a prosperous condition or not. Thus it will depend upon a variety of contingencies, whereas the Act of Parliament seems to have contemplated but one contingency. It may be a hardship on the shareholder to be made to rest under this undefined liability. He, however, has his remedy by paying each call by a fresh bankruptcy." And Mr. Justice Byles in the same case says: "Here there are two contingencies at the least—one, whether a call would ever be

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made—the other whether, if a call were made, the bankrupt would at the time be the holder of the shares. If, therefore, any case could be imagined in which the existence of two contingencies would prevent its falling within the 178th section, this is that case. Further, if the bankrupt be discharged, he is discharged from all the liability that ever can happen in respect of these shares, and then we are driven to this, that the bankrupt will hold his shares (for the assignees may not choose to interfere), and yet he is freed from all liability in respect of all calls past and future.” The question in that case was the same as the question here.

The position of an insolvent holder of shares is also well stated in *Hastie's Case* (m), in which the Lords Justices confirmed the previous decision of the Master of the Rolls in the same case. They there held that a bankrupt must be retained as a contributory to a company where the bankruptcy preceded the winding up of the company, and there was nothing to show that the calls were capable of valuation at the date of the bankruptcy.

A similar expression of opinion is to be found in a case decided by the present Lord Chancellor when one of the Lords Justices.* He there says: “While the concern is a going concern, the amount of liability to future calls is incapable of being estimated; but when the company is being wound up this state of things is altered, and the contributory is a debtor for an amount which the Legislature assumes to be capable of being estimated.”

I conclude this portion of my remarks by referring to the case of *The Financial Corporation, Limited, v. Lawrence* (n), in which Mr. Justice Byles lays down the law in these terms: “Until the winding up of the company the liability of the shareholder is not calculable. It not only depends on a great variety of circumstances, such as the prospects of the company and the position of the other shareholders, but the ownership of shares may even be a source of gain. This case

(m) Law Rep., 4 Ch. App. 274.

* *Ex parte Pickering*, L. R. 4, Ch. App. 58, 61.

(n) Law Rep., 4 C. P. 731.

seems on principle, therefore, to be similar to the case which has been cited of *Mudge v. Rowan* (o). There nobody could estimate the value of the contingency upon which the liability of the defendant depended at the date of the bankruptcy, and the Court of Exchequer, therefore, held that the debt was not proveable. Applying the principle of that decision to the case now before us, it seems to me that the defendant's liability was not calculable till the winding up of the company had taken place, and that this debt, therefore, would not have been proveable under a bankruptcy at the date of the deed." Mr. Justice Montague Smith, in the same case, after quoting the remarks of Lord Justice Wood which I have referred to, says: "I understand him to mean that until a company has begun to be wound up, the liability to future calls cannot be proved, because it cannot be estimated, and that the company is not to be considered as a creditor in respect of it, but that this is altered as soon as the winding up is commenced; and it is so because, as soon as the company begins to be wound up, the liability of the shareholders, which was not then an existing obligation, is altered by the statute into a different species of liability." These authorities appear to me conclusively to establish the proposition that Bábá Sáheb could not have obtained his discharge from his liability in respect of these shares under the provisions of the bankruptcy law in England, as his liability to pay calls at the time he filed his petition in insolvency and obtained his discharge was, in respect of these shares, incapable of valuation, inasmuch as there was then no certainty that he would be called upon to pay any calls in respect of them. The Indian Insolvent Act I shall presently refer to.

Now, has the Official Assignee been substituted as a shareholder instead of Bábá Sáheb, or has the liability in respect of these shares been transferred to him? I think not. The position of the Official Assignee is that he cannot be compelled to take upon himself the burden of an onerous undertaking. In *Boorman v. Nash* (p) it was held that a

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(o) Law Rep. 3, Exch. 85.

(p) 9 B. & Cr. 145.

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burdensome contract could not be foisted on the Official Assignee against his will. And in *Hastie's Case* (q) the Master of the Rolls, after many months taken for consideration, says: "It is obviously impossible to put the assignee on the list of contributories. He cannot be compelled to take the shares. He has repudiated them, and cannot be made liable for anything in respect of them" (p. 6); and again, at page 11, he says, speaking of Sec. 77 of the English Companies' Act, 1862: "I think that this does not deprive the assignees of their inherent power of electing whether to take the shares or not; and that if they decline to take them they cannot be compelled to do so. And after their refusal to take the shares, and after they have fully administered the estate of the bankrupt and distributed it amongst the creditors, it would be monstrous that a subsequent failure should make the assignees contributories, and thereby liable personally to pay those calls—assignees who have no property of the bankrupt remaining, and who have always refused to be mixed up with the affairs of the company." In the case I have cited from the 5th Exchequer Reports, Mr. Baron Parke concisely expresses the position of the Official Assignee in this respect, where he says (p. 135): "*A damnosa hæreditas* does not pass to the assignees without their assent." Indeed it was not seriously contended before me that such was not the law, but it was said that the Official Assignee had assented to take these shares, and the fact of Mr. Bendir having claimed against the estate of the insolvent by the letter of the 20th of December 1867, and of that claim having been registered by Mr. Gamble, was strongly relied upon, the book in which the claim was registered having been put in at the hearing of the summons, as well as a letter written by the Official Assignee to Mr. Bendir, in which it was stated that the Company's claim had been so registered. This being a matter of the practice of an officer of the court, I sent during the argument for Mr. Gamble, and in answer to me he stated in court that before an application to share in an insolvent's estate was admitted, it was necessary for the

(q) Law Rep. 7, Eq. 3.

claimant to make and file an affidavit of his claim. This Mr. Bendir did not do, and his claim was never admitted. If Mr. Bendir had wished to come in as a creditor upon the estate, he should have applied to come in under Sec. 38 of the Insolvent Act, and have caused the insolvent's schedule to be amended by the insertion of his claim. Mr. Bendir did not take any such step, the schedule was not amended, and the insolvent continued to be upon the list of contributories. This conduct of Mr. Bendir was to some extent relied upon, though to what extent I did not clearly understand, to show an election on his part to absolve the insolvent and proceed against his estate; but I do not think that argument is well founded, and as to the Official Assignee, the authorities show that in the above transaction there was nothing to render him liable, as mere interference with shares (even if there was any such interference here) does not render an Official Assignee liable. In the *South Staffordshire Railway Company v. Burnside* (*supra*) the Official Assignee did far more than Mr. Gamble has done here, and yet the jury held that he had not accepted the shares, and the court held that on the facts there was no sufficient evidence to warrant the jury in coming to any other conclusion. *Turner v. Richardson* (r) was referred to in that case. There the assignees advertised the sale by auction of the lease of certain premises of which the bankrupt was lessee (without stating themselves to be the owners or possessed thereof), and, no bidding offering, they never took possession in fact of the premises. It was held that this was no more than an experiment to ascertain whether the lease was beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term.

In the present case the shares were never in the possession of the Official Assignee, and I am of opinion that there has been no transfer of the liability in respect of these shares, either statutory or otherwise, to the Official Assignee.

This brings me to consider whether there is anything in

(r) 7 East 335.

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the Indian Insolvent Debtors' Act which discharges an insolvent from a liability of this nature from which he would not be absolved by the English Bankruptcy Acts, and it, for that purpose, becomes necessary to look closely at the words of the 47th and 48th sections of the Indian Act. (His Lordship read the sections.) That section (the 48th) is in substance the same as the corresponding section in the Act of Geo. IV., the only difference being that the words used in the 48th section are "sum or sums of money," whereas the English Act uses the words "debt or debts." That being so, the question under the two first heads I proposed for consideration is simply this. Was the claim in respect of these shares proveable in bankruptcy at the time of the Insolvency of Bábá Sáheb? I am of opinion it was not. It was not then a claim capable of valuation. It was not, in fact, a claim at that time. I, therefore, think that the two first questions must be answered thus :—That Bábá Sáheb is now the holder of twenty shares in the Financial Association, and that the company is not barred from making a claim upon him on the ground that the call was proveable under Sec. 48 of the Insolvent Debtors' Act.

That brings me to the third question, namely, whether Secs. 98 and 100 of the Indian Companies' Act (Act X. of 1866) afford any defence to this application. These sections were said to be identical with Secs. 75 and 77 of the English Companies' Act of 1862. I have compared these sections together, and find that they are so, excepting only certain alterations necessary to adapt them to India. Mr. Marriott relied upon these two sections, and argued that a personal discharge under the Indian Insolvent Act was different from a final discharge under the English Acts, and that, under Sec. 100, the Official Assignee ought to be deemed to be a contributory in lieu of the insolvent in respect of these shares. He argued that the company had been admitted to prove against the estate of the insolvent, and, that, therefore, the insolvent was no longer liable. He further argued that the cases cited for the Official Liquidator were not in point, as in them the proceedings

in bankruptcy had terminated before the orders for winding up the companies were made, but that here the proceedings in Bábá Sáheb's insolvency are still going on, as no final discharge under Sec. 60 has been granted to him. I do not think that such arguments are well founded. The sections of the English Act (identical in substance, as I have said, with the corresponding sections of the Indian Act) have been the subject of most careful consideration in 1868 and 1869 in England. And four distinct courts have there held that when the final discharge of a bankrupt shareholder has been granted prior to the commencement of the winding up of a company, there is no statutory transfer of the shareholder's liability, and the assignees are not in that case contributories. The first case was in the Court of Queen's Bench, and is the case of *Martin's Patent Anchor Company v. Morton (s)*, where Mr. Justice Blackburn says: "The following sections, 76 and 77, show that Sec. 75 refers to the bankruptcy still pending when the winding up takes place, while the assignees have still assets, and in such a case the company may prove for the estimated amount of the bankrupt's liability to future calls. Sec. 77 places the assignees in the position of the bankrupt as a contributory, for they are to be 'deemed to represent the bankrupt for all purposes of the winding up,' which could not be the case when the bankruptcy had taken place years before; and, therefore, it seems to me Sec. 75 does not apply to the present case, where the shareholders had been adjudged bankrupt and discharged before the winding up commenced." He then makes a remark not entirely approved of by subsequent authorities, and I, therefore, do not refer to it. In *Hastie's Case (suprà)* the Master of the Rolls came to the same conclusion, though he felt great doubt upon the subject. It was there held that a member of a limited company who has become bankrupt and obtained his discharge, and whose estate has been fully administered by the assignee, remains liable, in the event of the company being subsequently wound up, to be made a contributory in respect of his shares

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not fully paid up, and is not exonerated, under Sec. 75 of the Companies' Act, unless the assignee has been substituted for him, under Sec. 77 of the Companies' Act. That learned Judge put the case as one not foreseen and not provided for by the Legislature.

Hastie's Case was argued on appeal before Lord Justice Giffard (*t*) and the other Lord Justice, and they affirmed the decision of the Master of the Rolls; and although on points of law the opinion of the Master of the Rolls has not unfrequently been disapproved of by a court of appeal, yet the concurrence of his opinion with that of the Lord Justice Giffard tends strongly to show that their conclusion is correct. The Lords Justices were pressed with the provisions of Sec. 77 (and that was the section on which Mr. Marriott relied). In reference to that they say: "That may well be admitted without leading to the conclusion that Mr. Hastie's name ought not to be on the list of contributories, for without laying down a general rule that the 77th section applies to every bankruptcy, there may be circumstances under which the bankruptcy may precede the winding up, and the 77th section be applicable. It would be applicable if the assignees chose to take to the shares. It would be applicable to such calls as were made before the bankruptcy, as, for instance, if the Directors called up the whole or part of the capital and their calls were not met; again it would be applicable if, for any reasons or under any circumstances, the calls or any of them were capable of valuation at the date of the bankruptcy." But here none of these special circumstances exist, and Mr. Gamble has not elected to take the shares.

The latest case on this subject was in the Court of Common Pleas—*The Financial Corporation, Limited, v. Lawrence* (*u*); there A, being the holder of shares in a company, executed an inspectorship-deed. After the execution of the deed a call was made upon A's shares. Subsequently, but before the property included in the deed had been distributed among the creditors, the winding up of the company commenced; it was held that the call was not barred by the deed. In that

(*t*) 4 Ch. App. 274.

(*u*) Law Rep. 4, C. P. 731.

case Mr. Justice Byles makes a remark which is applicable to and refutes the argument of Mr. Marriott with reference to the final discharge of the insolvent not having been obtained: "A bankrupt obtains his discharge as soon as he has made a full disclosure of his estate, and before it has been distributed. I cannot see, therefore, how the fact of the bankrupt having obtained his discharge in those cases should affect the question:" p. 735.

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These cases show what is the proper construction to be put upon Sec. 77 of the English, and Sec. 100 of the Indian Companies' Act, and I do not think that any good reason has been shown why they should not also apply to the case of a discharge under Sec. 47 of the Insolvent Act. The groundwork of these decisions is that at the time of the insolvency there was no claim capable of valuation, or which could have been inserted in the insolvent's schedule; that an insolvent is only discharged from debts proveable under the insolvency, and that those debts only are proveable which are capable of valuation at the date of the insolvency. I think, therefore, that these cases are authorities in favour of the Official Liquidator, and that Mr. Ferguson was entitled to rely upon them; and, considering as I do that they have been correctly decided, I think that I am bound by them. The result, therefore, is that Bábá Sáheb still remains a contributory, notwithstanding the events that have happened, his case being one not provided for by Act X. of 1866, the Official Assignee having declined, as he lawfully might, to take those shares. There has no statutory transfer or statutory release of his liability taken place. Bábá Sáheb's name being on the list of contributories, the burden lay upon him to show that it ought to be removed from it, and the name of some other person substituted. This he has failed to do. There has no sufficient cause been shown against the summons, which must, therefore, be made absolute with costs.

Attorney for Bábá Sáheb: *R. J. Abraham.*

Attorneys for the Official Liquidator: *Manisty and Fletcher.*

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July 18.

Appeal Suit No. 176.

RATANBA'I, widow(*Plaintiff*) *Appellant.*

THE GREAT INDIAN PENINSULA

RAILWAY COMPANY.....(*Defendants*) *Respondents.*

*Death caused by Negligence—Compensation to Family of Deceased—
Measure of Damages—Act XIII. of 1855.*

Measure of damages to be given (under Act XIII. of 1855) to the family of a person whose death has been wrongfully caused, considered.

English cases bearing upon the subject discussed and applied.

THIS was an appeal from the decision of WESTROPP, C.J., in Original Suit No. 326 of 1869. Judgment was delivered in the Division Court on the 28th of August 1870. A brief summary of the facts of the case will be found at page 120 of the 7th volume of the Bombay High Court Reports, Original Civil Jurisdiction.

In addition to the facts there set forth, it was stated by Bamanji, the eldest son of the deceased, that, besides the property mentioned in the schedule of the deceased as possessed by him during the time over which his schedule extended, he had also been possessed of a sum of Rs. 60,000, which had been lost by the misconduct of one of his sons, Hormasji. This fact did not appear on the face of the schedule. It was also stated by Bamanji that the profits of the deceased for the year preceding his death had risen to the sum of Rs. 500 or 600 per mensem, but the deceased's books for that year were not produced at the hearing, and the learned Chief Justice said that he did not consider Bamanji's evidence trustworthy.

The appeal came on for hearing on the 15th of June 1871, before SARGENT and MELVILL, JJ.

Anstey and *Mayhew*, for the appellant :—The learned Chief Justice was wrong in taking the schedule, and the sum of Rs. 19,000 entered therein as the profits of the deceased, as the basis of his calculations. During the latter period of his lifetime the deceased had carried on two classes of business—1st, that of speculator ; 2nd, that of skilled workman.

For some years preceding his insolvency he had almost abandoned the latter for the former, and his insolvency was caused thereby. During the year immediately preceding his death he had returned to his legitimate business, and the profits of that year should be taken as the basis upon which the damages should be awarded. The statements of Bamanji as to the amount of these profits are entitled to credit. There was, at any rate, a reasonable expectation of an increased profit to the relations of the deceased from the continuance of his life, by reason of his having discontinued his speculations. This ought to have been taken into consideration in awarding the damages: *Dalton v. South-Eastern Railway Company* (a); *Franklin v. South-Eastern Railway Company* (b); *Pym v. Great Northern Railway Company* (c). The damages should not have been calculated according to annuity tables: *Armsworth v. South-Eastern Railway Company* (d), per Parke, B. The measure of damages under Lord Campbell's Act is not the same as that in actions brought by the sufferer himself. In the latter class of cases pecuniary loss must be distinctly proved, and such proof only can be acted upon. In the former class the mere relation of parent and child, and the loss of the former, is sufficient to warrant the court in awarding damages: *Tilley v. Hudson River Railway Company* (e). See this case and other American authorities collected in a note at page 652 of Mr. Sedgewick's work on Damages (4th ed.).

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The Honorable A. R. Scoble (Acting Advocate General) and *Ferguson*, for the respondents:—The Chief Justice had to consider in awarding damages, *firstly*, what was the position of the deceased at the time of his death, and *secondly* what reasonable expectation he then had of retrieving his former position. The schedule was the only safe guide for estimating his prospective by a consideration of his past profits. The deceased was an insolvent who had only obtained a personal

(a) 27 L. J., C. P. 227; S. C. 4, C. B., N. S., 296.

(b) 3 H. & N. 211.

(c) 32 L. J., Q. B. 377; 4 B. & S. 396. (d) 11 Jur. 758.

(e) 29 New York Rep. 252.

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discharge under the Act. There was no reasonable expectation that he would have materially improved his position. All contingencies must be considered: see the judgment of Cockburn, C.J., in *Pym v. Great Northern Railway Company* (f). Damages must be confined to pecuniary injury; no *solatium* can be given for wounded feelings: *Blake v. Midland Railway Company* (g).

Anstey, in reply:—We do not claim anything as mere *solatium*. We ask for damages for the loss of a parent's care and nurture.

Cur. adv. vult.

18th July 1871. SARGENT, J.:—This suit was brought under Act XIII. of 1855 by the widow and administratrix of one Pálanji Jivanji, who was killed on the 26th of January 1869 at the Reversing Station on the Bhoze Ghát. The only question in the case is, whether the learned Chief Justice has rightly assessed the quantum of damages for the loss resulting from the death of the deceased to the parties for whose benefit the suit was instituted. The wording of this Act is almost identical with that of the corresponding English Act, commonly called Lord Campbell's Act—the only difference (if it be one) being that in the English Act the jury are to give damages proportioned to the "injury," and in the Indian Act the court is to give damages proportioned to the "loss" resulting from the death. The latter expression is (if anything) not so large as the former, and, therefore, so far, is less favourable to the parties claiming compensation.

Now, although some difference of opinion would appear to have existed amongst Judges sitting at Nisi Prius in the early cases tried under the English Act, as shown by the summing up of Mr. Baron Parke in *Armsworth v. South-Eastern Railway Company* (h) and of Chief Baron Pollock in *Gilliard v. Lancashire and Yorkshire Railway Company* (i), it was afterwards clearly laid down by the Queen's Bench in *Blake v. Midland Railway Company* (j) that the principle upon which

(f) 2 B. & S. 759. (g) 18 Q. B. 93.

(h) 11 Jur. 758. (i) 12 Law Times R. 356. (j) 18 Q. B. 93.

damages are to be assessed is that of a loss of which a pecuniary estimate can be made ; and that, therefore, compensation in the form of a *solatium* could not be given. Further, it was laid down, both by the Court of Common Pleas in *Dalton v. South-Eastern Railway Company* (k) and by the Exchequer Chamber in *Franklin v. South-Eastern Railway Company* (l), that the pecuniary advantage was not to be confined to one for which the deceased would have been legally liable, but might be one of which the claimant had a reasonable expectation. Both those principles were adopted and applied by the Exchequer Chamber in *Pym v. Great Northern Railway Company* (m). Chief Justice Erle, who delivered the judgment of the court, says :—"The jury were bound to give damages for the money which they supposed lost by the reasonable probability of pecuniary benefit being taken away by the death." We see no reason for applying a different principle to cases under the Indian Act. Now, the deceased in the present case was a man of fifty-three years of age. He had filed his schedule in the Insolvent Court on the 12th of November 1868, and, after several postponements arising from the unsatisfactory state of his balance-sheet, was expecting his discharge in the following March. His legitimate trade had been that of a contractor for building houses, and repairing ships in the harbour ; but it appeared from his balance-sheet that in about 1864 he became engaged in extensive land and building speculations with borrowed capital, which proved unsuccessful. That from 1861 to the time of filing his schedule, the amount of gross profits realised by his business had been only Rs. 19,000, whilst the losses on two contracts alone had amounted to Rs. 19,446 ; and that at the time of his becoming insolvent he owed Rs. 1,22,359 to general creditors, one of whom had a mortgage on the only piece of property (except some trifling jewellery) left to the insolvent, namely, a house in the Fort, valued by himself at Rs. 66,000. Much stress, indeed, was laid on a sum of Rs. 60,000 which, it was said, had been made away with by the deceased's son Hormasji before the insolvency. We think

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(k) 4 C. B., N. S. 296. (l) 3 H. & N. 211. (m) 32 L. J., Q. B. 377.

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that the evidence before the court in support of this story—whatever other evidence it might have been in the plaintiff's power to give—was quite unreliable; but in any case the money is gone, and we do not understand how the story, if taken as proved, can materially affect the question before the court as to the probable future property of the deceased, had he lived. The probable future of such a man must necessarily, for the most part, be matter of mere conjecture. It does not admit of being determined by any strict process of reasoning; but, looking at the deceased's past career, as disclosed by the schedule, we can discover no ground of reasonable expectation that there would have been any source to which the wife and family could look for pecuniary benefits other than the profits of his regular business. It was, however, objected that the Chief Justice should not have taken as the basis of his calculation the entry in the schedule of profits realised between 1861 and 1868. It was said that the profits of the deceased's regular business might reasonably be expected to be larger than before his insolvency, as he had abandoned speculation and devoted himself exclusively to his legitimate calling. And the evidence of his son Bamanji was relied on to show that his monthly profits during the year preceding his death had risen to between Rs. 500 and Rs. 600. But we cannot accept the mere statement of Bamanji as sufficient proof of what those profits may have been, more especially when we find him admitting that his father sustained a loss of Rs. 12,000 in doing repairs to a ship called the "Ritual" during the last year of his life, and that he could not say whether his losses exceeded his gains, as he did not keep his accounts. If it were intended to rely on the increase of his business during the year preceding his death, the books of the deceased should have been produced, as the best and proper evidence as to the state of his business. Lastly, it was urged by Mr. Anstey that the court should give compensation for the loss of deceased's "protection and care," and the authority of an American case cited in Sedgewick on Damages was pressed on us as establishing that proposition. Now, so far as by the expression "protection and care" may be meant the

money which a father can reasonably be expected to spend on his family, compensation has been given for it ; but so far as it is intended to mean more than that, without saying that under very special circumstances it might not be brought within the principle we have laid down, we are of opinion that no such circumstances exist in the present case. On the whole, we are unable to say that the family had a reasonable and well-grounded expectation of pecuniary benefit exceeding the sum assessed by the learned Chief Justice ; and the appeal must, therefore, be dismissed, and with costs, unless the company consent to waive them, which, as this is the first case in which the application of the Act has been fully discussed, we think they might do with great propriety.

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Appeal dismissed.

Attorneys for the plaintiff: *Macfarlane and Skipsey.*

Attorneys for the defendants: *Hearn, Cleveland, and Peile.*

HARIVALLABHDA'S KALLIA'NDA'S *Plaintiff.* July 27.
UTAMCHAND MA'NIKCHAND *Defendant.*

Practice—Sequestration—Indorsement upon Copy-Order—Limiting Time in Order—"Forthwith"—Supreme Court Rules, Nos. 388 and 389.

The process of sequestration for contempt of a decree or order of court, as it existed in the late Supreme Court, will, in a proper case, issue out of the High Court.

The object of Rule 389 of the Supreme Court Rules, which required a party who wished to enforce an order by sequestration to indorse upon the copy of the order served upon his opponent a memorandum to the effect that in default of performance of the order he would be liable to be arrested, and to have his estate sequestered, was to enable the party making such indorsement to apply *ex parte* for the writ. In the absence of such a memorandum indorsed upon the copy-order, a party desirous of enforcing an order by sequestration must give proper notice to his opponent of his intention to apply for the writ.

An order commanding an act to be done "forthwith" is sufficiently in conformity with the rule that requires the time within which an act ordered to be done is to be performed to be specified in the order.

A statement of the proceedings in this case will be found in the 7th volume of the Bombay High Court Reports, O. C. J., p. 172.

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As there stated, the defendants, Utamchand Mánikchand, Ghellabhái Hemchand, and Tulsidás Kisandás, were, on the 10th of February 1871, committed to jail under an attachment for contempt in not obeying the court's order of the 5th of September 1868.

The said defendants not in the meantime having purged their contempt, notice of the plaintiff's intention to move for a writ of sequestration against them was given to their solicitors on the 22nd of July, and a more formal notice to the same effect was again served upon their solicitors on the 24th of July.

Anstey, on the 27th of July, in pursuance of the above notices, before WESTROPP, C. J., and SARGENT, J., moved that a writ of sequestration should issue. The application was founded upon affidavits which showed that the above-named defendants were respectively possessed of property within the limits of the ordinary original jurisdiction of the High Court.

Anstey :—The writ for which I move is one that had its origin in Courts of Equity in England, not from legislative enactment, but, as it were, *ex necessitate rei*. It is said that the first instance of a sequestration after a decree was in Sir Thomas Read's case, in Lord Coventry's time. There appear to have been great struggles between the Courts of Common Law and Equity before the process was established : Daniell's Ch. Pr., pp. 1029, 1030 (2nd ed.) ; Smith's Ch. Pr., Bk. I., Ch. 4, p. 121 (6th ed.). Its legality has, however, been now long established : *Cavil v. Smith* (a) ; *Wharan v. Broughton* (b) ; *Mitchell v. Draper* (c). The late Supreme Court adopted this process from the Courts of Chancery in England : *Doe dem. O'Hanlon v. Paliologus* (d). The above-cited cases show that the goods and chattels of a defendant in contempt may, on order made on motion for that purpose, be sold by the sequestrators. This is so in India also : *Fabian v. Walter* (e). The rules of the Supreme Court in reference to sequestrations were modified in the year 1843. The

(a) 3 Brown's Ch. Ca. 362. (b) 1 Ves. Sen. 180. (c) 9 Ves. 208.

(d) Mor. Dig., Vol. I., p. 581. (e) 3 *Ibid.* 374 ; S. C. Taylor 275.

existing rules upon this subject are Rules 220, 386, 387, and 388 of McKenzie's Compilation. The writ will issue out of the High Court, as nothing inconsistent with its so issuing is contained in the Code of Civil Procedure, and, so far as the same is not inconsistent with the Code of Civil Procedure, the practice of the late Supreme Court is the practice of this court: High Court Rules, Ch. II., R. I. Act VI. of 1855, Sec. 13 (not affected by Act VIII. of 1868); the Letters Patent of the High Court, cl. 11; Seton on Decrees, pp. 1214, 1216; and Maddock's Principles of the Court of Chancery, Vol. II., p. 256, were also referred to. As this writ issues as of course, and is supplementary to the writ of attachment for contempt, it is not necessary to enter into the merits of the case.

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Latham, for the defendants Utamchand Mánikchand and Tulsidás Kisandás:—We do not contend that this court has not the power to issue writs of sequestration, but we contend that the writ ought not to issue in this case, because the provisions of Rule 389 have not been complied with. (I.) There is no time specified in the order of the 5th of September 1868 within which the acts therein commanded are to be done: *Cherry v. Cherry* (f). The order in this case only states that the acts commanded to be done shall be done “forthwith,” and we submit that that is not a sufficient compliance with the requirements of the law. (II.) On the copy of the order served upon the defendants there has not been indorsed a memorandum to the effect that if they neglected to perform the order within the time limited, they would be liable to be arrested and to have their estate sequestered, for the purpose of compelling them to obey the order. *Non constat* that if this endorsement had been made, the defendants would not have obeyed the order. Rule 389 must be read in close connection with Rule 388. Under this view the court has no jurisdiction to issue process of sequestration until due service has been effected, and until the time limited in the order has elapsed. Whatever may be the practice at home—under the rules of the Supreme Court, attachment and sequestration are

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concurrent processes independent of one another. [WESTROPP, C. J.:—In the case of attachments for contempt, the practice has grown up of granting a rule *nisi* only in the first instance, and hence there is no longer any necessity for the indorsement upon the order. A rule *nisi* has been substituted for it.] No analogous practice exists as to the issue of writs of sequestration.

Macpherson, for Ghellábhái Hemchand, followed.

Anstey, in reply :—Rule 389 applies to and must be read in connection with the subsequent, not the preceding, rule. If that is not so, I contend that Rule 389 only applies when an *ex-parte* order for sequestration to issue is asked for, not to applications upon notice. Its provisions too are merely directory. Notice of this application has been given to the defendants.

WESTROPP, C. J.:—We think that in this case, it not being denied by the learned counsel for the defendants Utamchand, Tulsidás, and Ghellábhái, that the power is resident in this court of issuing writs of sequestration for seizing the property of persons guilty, as these defendants are, of contempt of court, (Stat 24 and 25 Vict., c. 104, s. 11; Rule 1, Chap. II., High Court Rules), the only questions for us to determine are those which the learned counsel have raised upon the 388th and 389th rules of the late Supreme Court, which regulate the issuing of such writs. Rule 388 says: "If any party who is, by an order or decree, ordered to pay money or do any other act in a limited time, shall, after due service of such order, refuse or neglect to obey the same according to the exigency thereof, the party duly prosecuting such order shall, at the expiration of the time limited for the performance thereof, be entitled to a writ of sequestration, and such other process as he hath hitherto been entitled to, after a commission of rebellion has been returned *non est inventus*." It was said, or rather suggested, that there was no time limited in the order of the 5th of September 1868, for the contempt of which these defendants stand committed, for the performance of the directions contained in that order; but we are of opinion that by the word "forthwith" a limited, and that

the most limited, time was appointed for the delivery, to the receiver, of the diamonds and other unsold partnership property, and it cannot be denied that the period of nearly three years which has elapsed since the making of this order, has not allowed the defendants the most ample time for complying with it. And so much of the order as prohibited the parties from collecting or receiving the assets or outstandings must be regarded as operating from the moment it was made. That part of the order, as well as the previous part relating to delivery of the diamonds, &c. to the receiver, these three defendants have disobeyed. The language of the order on this point is as follows :—

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“ And it is further ordered that all parties defendants in these suits do forthwith make over to the said receiver all the diamonds and unsold articles forming part of the property the subject-matter of these suits, and in the plaints thereof respectively mentioned, which is or may be in their custody, power, or control, together with all accounts, books, papers, and documents relating thereto. And it is further ordered that the said receiver do get in and receive all outstandings due to the said partnerships respectively, or forming part of the subject-matter of these suits or of either of them. And it is further ordered that all the said parties, and all persons whatsoever, save and except the said receiver or those acting under him or by his order, be, and they are hereby, prohibited from collecting or receiving any of the assets or outstandings of the said partnerships or either of them, and from in any way intermeddling with the collection thereof.”

The objection as to the limitation of time is thus disposed of on reference to the order.

The 389th rule is that upon which the defendants' second objection is founded. That rule is as follows :—

“ Every order or decree requiring any party to do an act thereby ordered shall state the time after service of the decree or order within which the act is to be done ; and upon the copy of the order which shall be served upon the party required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz. : ‘ If you, the within-named A. B., neglect to perform this order by the time therein limited, you will be liable to be arrested by the Sheriff, and also be liable to have your estate sequestered, for the purpose of compelling you to obey the same order.’ ”

That latter provision has not been complied with here, but assuming that this rule applies to the rule preceding, and not merely to the rule following it, we think that the object of requiring such a memorandum to be indorsed upon the copy

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of the order was to enable the party complaining of a non-compliance with the order to make an *ex-parte* application to the court for a writ of sequestration, and to give the person upon whom the order was served notice that he would be liable to have his estate sequestered forthwith upon his disobedience of or non-compliance with the order. In the case before us there does not appear to have been any such indorsement upon the copy of the order, but the present is not an *ex-parte* application. It is an application made upon notice given by the plaintiffs five days before this motion, namely, on the 22nd, and repeated on the 24th, of the present month. We think that the parties have thus had notice that this writ would issue if they did not obey the order, and that an application of this sort was not what Rule 389 referred to. We hold, therefore, that the writ of sequestration in this case must go. The plaintiff is entitled to his costs of this motion, to be paid by the defendants in contempt who opposed it.

Order accordingly.

Oct. 6.

LA'LCHAND RAMDAYA'LPlaintiff.

GUMTIBA'I, widow.....Defendant.

GHELLA' PEMA' and others Plaintiffs.

GUMTIBA'I, widow.....Defendant.

Administrator of the Estate of a deceased Hindú—Letters of Administration granted to Administrator General—Relation back—Suits brought before Grant of Letters of Administration against Representatives of a deceased Hindú—Administrator General's Act (XXIV. of 1867).

The legal *status* of the administrator of the estate of a deceased Hindú, as compared with the legal *status* of the administrator of the estate of a deceased person who in his lifetime was governed by English law, pointed out.

When ordinary letters of administration to the estate of a deceased Hindú are granted to the Administrator General under Act XXIV. of 1867 (but not under Sec. 17 of that Act), his title does not relate back to the death of the deceased, nor to the date of the Judge's order directing such letters to be issued, but accrues only as from the date of the grant of such letters.

Quere—whether, if letters are issued to the Administrator General under Sec. 17 of that Act, the case would be otherwise, or his powers greater.

Where a Hindú died leaving a widow and no male issue, and two of the creditors of the deceased brought suits against such widow as the legal

representative of the deceased, and attached before judgment certain property of the deceased and afterwards obtained judgments against the widow, an application on behalf of the Administrator General, who at the widow's request, but after the judgments were obtained, took out letters of administration to the estate of the deceased, to have such attachments removed, was refused, though the Judge's order, directing that the letters should be issued to the Administrator General, was prior in time to the passing of the judgments; and the judgment-creditors were held entitled to be paid out of the property attached, so far as the same proved sufficient for that purpose.

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THE question involved in these cases, and the facts and arguments, sufficiently appear from the judgment of the court.

Dunbar for the Administrator General.

Marriott for the plaintiffs.

Cur. adv. vult.

WESTROPP, C. J.:—This was an application on behalf of the Administrator General (originally by summons, but afterwards, on account of the nicety of the legal points involved in it, adjourned into and argued in court) to remove attachments before judgment laid upon moveable property, part of the estate of, the late Govind Girdhar, on the 19th of December, who had died intestate and without leaving issue.

Five days after the laying on of the attachments, Gumtibái, the defendant in both suits, being the widow and sole personal representative of Govind Girdhar, and sued as such in these actions, caused her solicitor to write a letter to the Administrator General stating that her husband had died without issue and in insolvent circumstances, leaving certain moveable property and effects and outstandings in Bombay; that she was not desirous to administer his estate; that she requested the Administrator General to take charge of the assets, and to obtain letters of administration thereof, and to divide the assets amongst the creditors at large of her deceased husband. The letter also mentioned that his Már-vádi creditors had obtained attachments; that she had not sufficient interest to oppose them, but was willing to assist the Administrator General in doing so.

Accordingly, on the 6th of January, the Administrator General petitioned this court for letters of administration of

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the estate of Govind Girdhar. On the 9th of January the sitting Judge made his order on that petition, directing that such letters should issue to the Administrator General.

On the 11th of January the plaintiff in the first suit obtained in court a decree for Rs. 2,929-9-2, and on the same day the plaintiffs in the second suit obtained a decree for Rs. 1,768-14-0.

On the 27th of January letters of administration were issued to the Administrator General, pursuant to the Judge's order of the 9th of January.

On the 1st of February the Administrator General obtained a summons in each of these suits from the sitting Judge, calling upon the plaintiffs in both suits to show cause why the attachments granted before judgment should not be removed. The summonses also contained interim orders for the stay of proceedings in both suits.

The decree made in the first suit, on the 11th of January, was drawn up and sealed upon the 5th of February, and that made on the 11th of January in the second suit was drawn up and sealed on the 8th of February.

It was contended for the Administrator General that he was entitled to demand the removal of the attachment: 1st, because the letters of administration issued to him on the 27th of January related back to the time of the death of the original debtor, Govind Girdhar, and that judgments in suits against his widow could not bind the estate as against the Administrator General, in whom it must be considered as vested from the time of the death of Govind Girdhar; 2ndly, that even if the letters did not so relate back, yet, the order for granting them having been made on the 9th of January, *i.e.*, two days before these judgments were obtained, the estate of Govind Girdhar must be regarded as having been divested from Gumtibái, and vested in the Administrator General, before the judgments were recovered; and that she, therefore, did not then represent the estate, and that the attachments before judgment must fall on the accruer of a *jus tertii*, such as that of the Administrator General. In

support of this argument there were cited *Javá Rámji v. Jálavji Náthá* (a), and the ruling secondly mentioned in the head-note of *Gamble v. Bholágir* (b), and two Calcutta cases—*Rampersad v. Calachund Das* (c), and *Indra Chandra Dogar v. Tarachund Dogar* (d)—which, going beyond the abovementioned Bombay cases, ruled that though the title of the Official Assignee may not accrue until after judgment and the issuing of an attachment upon it, yet if his title accrue before sale the execution-debtor is thereby ousted. Counsel for the Official Assignee in *Gamble v. Bholágir* did not venture to put his case so high, but admitted that if seizure had taken place under the warrant of attachment on the five decrees which were made before the vesting order transferring the estate of the defendants to the Official Assignee, the execution-creditor should be preferred, and as to these five decrees simply contended that there had not been any sufficient seizure, a point which was decided against the Official Assignee. The four other decrees were not obtained until after the vesting order, and the attachments before judgment in these four cases were held to be unsustainable against the Official Assignee. Beyond this latter ruling this court has never gone in favour of the claim of the Official Assignee, and the two Calcutta cases already mentioned have been much questioned here. I have always thought that the difference between the rule in Insolvency from that in Bankruptcy was overlooked in those cases. *Woodland v. Fuller* (e) and *Hutton v. Cooper* (f) exemplify that difference. It has been clearly recognised by a recent Full Bench decision in Calcutta—*Anand Chandra Pal v. Panchilal Sarma* (g)—which must be regarded as completely overruling the two other cases there decided. I fully concur in that recent decision, but I think that in the present case too much stress has, in the course of the argument, been

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(a) 1 Bom. H. C. Rep. 224; S. C. 2 Bom. H. C. Rep. 142, nom. *Savá Rámji v. Jálavji Náthá*.

(b) 2 Bom. H. C. Rep. 146 *et seq.* (c) 1 Ind. Jur., N. S., 325, 373.

(d) 2 Beng. Law Rep., A. C. J. 61.

(e) 11 Ad. & E. 859.

(f) 6 Exch. 159; and see the remarks in 3 Bom. H. C. Rep., 26 O. C. J., and the cases there mentioned.

(g) 5 Beng. Law Rep. 691; S. C. 14 Calc. W. Rep., F. B. R. 33.

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laid upon the supposed analogy between the office of Administrator General and that of Official Assignee. I think that the decision in this case must rest upon other grounds, and upon authorities which have not been cited.

It is difficult to maintain that the Administrator General occupies, with respect to a creditor seeking to enforce a decree against the estate of the deceased, even so favourable a position as that of the Official Assignee, when the vesting order precedes a seizure under a decree made at the suit of a creditor of the insolvent.

It may be true that the Administrator General is a trustee of the estate of the deceased for his creditors, and, after payment of their claims, for the next of kin, in the same manner as the Official Assignee is a trustee for the creditors of an insolvent, and of the surplus, if any, for the insolvent himself. It must be borne in mind that the deceased was a Hindú, and that on his death there was not any need of letters of administration for the ascertainment of the person in whom his property should be vested (*h*). It vested immediately upon his death in his widow, Gumtibái, as his heir, he having died both childless and separate. It seems at one time to have been doubted whether the operation of Stat. 21 Geo. III., c. 70, s. 17, reserving to Hindús and Muhammadans their laws of succession, was not to prevent the court from granting probate of wills or letters of administration with regard to the estates of Hindús and Muhammadans: 1 Morley's Dig., pl. 53, p. 245; pl. 66, p. 246. But afterwards the court held that, with the consent of all the next of kin of the deceased, such a grant might be made: *In the goods of Beebee Muttra* (*i*). *In the goods of Shaik Nathoo* (*j*), Peel, C. J., in 1844, said: "In granting administrations to Native estates the interference of the court originally proceeded upon the supposition of the consent of the parties interested. The practice thus adopted by this

(*h*) 2 Stra. Notes of Ca. 153.

(*i*) 1 Morton R. 75; 1 Morley's Dig., p. 245, pl. 60; and p. 384, pl. 195 *et seq.*, and note.

(*j*) Fulton R. 485, 486.

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court has been lately 'recognised by the local Legislature,* but it is discretionary with the court to grant such administration. Here one party, admitted to be equally entitled at all events, dissents immediately upon notice. There is no difference between the case of Mahomedans and Hindus." And *In the goods of Moonshee Hossein Ali (k)*, in 1843, he said: "The power of this Court to grant probates and administrations in Native estates, where there is property within the local jurisdiction, has been lately recognised by the Legislature. The Court has got the power to select the administrator, and upon that ground we might uphold this administration. In Hindú and Mahomedan cases any party may be appointed by consent of the next of kin. The Registrar (predecessor of the Administrator General) would usually be preferred, but need not necessarily apply in his official capacity."

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And *In the goods of Sumboochunder Mitter (l)*, which was an application for the grant of letters of administration to one of two sons of the deceased (a Hindú), the other declining to join in the administration, and alleging the existence of a will, Peel, C.J., said: "The grant of administration would not conclude the question of the will. A Hindu is not bound to apply for probate." And again: "This Court has no jurisdiction over the brother on the Ecclesiastical side, except upon his own consent, and administration being granted to this applicant would not prevent the other setting up the will. We have several times been applied to for administration of Hindu and Mahomedan estates on consent of some of the next of kin, but have always refused it, as it would be establishing indirectly a compulsory jurisdiction over Hindus and Mahomedans. It can only be done on the consent of all, and then the jurisdiction is founded on their consent. But if done with the consent of some only, it would be an interference with the law of inheritance, by breaking the descent and making one representative, whereas the Hindu Law says all are representatives. Such an interference would be

* Act XX. of 1841.

(k) Fulton R. 339, 341.

(l) 1 Taylor & Bell 39, 40.

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a violation of the statute (21 Geo. III., c. 70, s. 17) which says that Hindus and Mahomedans are to have their own law of inheritance and succession." Those remarks, made in 1849 by Sir L. Peel, C.J., were concurred in by Buller and Colvile, JJ.

Another important and interesting case on the same subject came in 1850 before Sir L. Peel, C.J., and Colvile, J. —*Mohar Ranee Essadah Bai Sahib Peishwa v. The East India Company (m)*, at the Equity side of the Supreme Court. The plaintiff was the adoptive mother of Chimná A'ppá the elder, known to readers of Grant Duff's History of the Mahrattas as Chimnáji, adopted son of Mádhav Ráv, Peshwá of Puná. Chimnáji, having rightfully succeeded Mádhav Ráv Peshwá on his death, was deposed by Búji Ráv, and several years afterwards (in 1832) died at Benáres intestate, leaving a widow, Káveri Báí, and a daughter, Dwárká Báí, then both in their minority. The plaintiff, therefore, then applied for letters of administration of the estate of Chimnáji. He had left effects of the value of more than eight lákhs of rupees at Benáres, and also property at Puná and Bombay, of which the defendants, the East India Company, took possession at his death. Some delay occurred in the granting of letters of administration to the plaintiff, in consequence of her proposed sureties being objected to.

In 1834 the defendants, assuming to act as guardians of Chimnáji's infant widow, Káveri Báí, filed a caveat to the plaintiff's application for letters of administration. The caveat was, in the same year, dismissed. It was *alleged* in the bill in Equity that other obstacles were thrown in the plaintiff's way in obtaining letters, and that she did not eventually obtain them until February 1848. Káveri Báí, the widow, had died in 1837; Dwárká Báí, the daughter, had died in 1842, but had left a son, Chimná A'ppá the younger, who was alive at the time of the hearing of the Equity cause, but out of the jurisdiction. The will treated the defendants as executors *de leur tort*, and prayed an account of Chimnáji's property come to their hands. The answer treated Chimnáji as an

(m) 1 Taylor & Bell, 290.

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alien prisoner of war, who was allowed to reside at Benáres as a state prisoner under the surveillance of the Agent of the Governor General, and alleged (*inter alia*) that, at the desire of the family and confidential servants of Chimnáji, upon his death the said Agent intermeddled with his property, and admitted that the defendants did assume to act as guardians of Káveri Báí, she being an infant, though a widow. They also stated that in 1834, the Agent, by order of the Governor General in Council, made over the whole of the property belonging to Chimnáji to Mahádev Pant, the uncle of Káveri Báí, as her guardian, and with her privity and consent. The defendants relied upon the laches of the plaintiff, and on the statute of limitation, and denied their liability to the suit, inasmuch as the acts of the Governor General and his Agent were of a political nature, done at Benáres under the authority and with the sanction of the Governor General and Vice-President of Bengal, and submitted to the court whether they could be regarded as trustees for the representatives of Chimnáji or executors *de leur tort*. They also said that Chimnáji's property wholly consisted of savings of a monthly gratuitous pension of Rs. 25,000 allowed to him by the defendants. For the plaintiff it was denied that Chimnáji could be regarded as an alien enemy, or prisoner of war, and it was argued that he was a prisoner of state only, and, as such, could acquire property. The court was of opinion that if Chimnáji could be regarded for some time previous to his death as an alien at all (which it doubted), he was not an alien enemy, but an alien *ami*, and as such could acquire, maintain, and transmit property, and that the defendants were liable to the jurisdiction of the court in respect of it; but Sir L. Peel, C.J., added: "As accountable parties for acts antecedent to the grant of letters to her (the plaintiff), they are accountable, not to her, but to the legal representative of the estate: nor does the minority of the present heir (Chimná A'ppá the younger) alter the case; he is nominally a party to the suit, but not subject to the jurisdiction, and he would not be bound by any account taken in this suit (n); and, therefore, we

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(n) *Carmichael v. Carmichael*, 2 Ph. 101.

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think that the complainant cannot call for the account she asks, which is the general one, in her character of administratrix, and that she has laid no good title to any other," and the bill was dismissed accordingly. In speaking there of the legal position of the plaintiff as administratrix, Peel, C.J., said: "The grant of letters of administration, on application of a sole heir of a Hindu, could be supported originally only as a submission voluntarily to a jurisdiction to which he could not be cited, with the consequence of having administration granted to another if he declined, as in the case where letters of administration are indispensable to perfect the representation. It is in such a case a renunciation of his own law, the voluntary adoption of another. If the application were made by one of several joint heirs with the assent of all, they would be concluded, by their concurrence in the grant, from derogating from its legal effect by asserting, against one claiming under it, their original representative character; *but it can have no effect, irrespective of the provisions of the late Act of the Indian Legislature,* which is limited to the payment of debts, and of which the protection of the debtor is the object, against Hindu representatives, dissentient or non-assentient* (and an infant can give no consent in the matter): therefore the letters in this particular case do not divest the legal estate, and do not give a title to demand from the defendants, who object to account to her, the account which a perfect title of administration under the English law would give. It does not follow from this view that such letters are inoperative wholly: for, independently of their effect in the payment of debts under the present Act, they may, when the administrator has an interest, give a limited title to that extent to one who is willing to take under the letters. I have always, in granting letters of administration, regulated myself by this doctrine, though I will not undertake to say that in some cases the objection may not have escaped me. I have required the assent of parties *in æquali jure* with the applicant, and have in several instances refused it where no such assent appeared, and the late

* Act XX. of 1841.

2123 Son, 457
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Mr. Justice Seton acted likewise on one occasion (which I well recollect) on the same principle."

Sir J. Colvile, J., said : "The plaintiff claims to be representative of the deceased by virtue of letters of administration obtained in this court so late as 1848. She is not the representative according to the rules of Hindu succession, and beyond a claim for maintenance has no interest in his estate. His heiress-at-law was his widow, and on her decease the succession passed to his daughter, and his present heir is the son of that daughter. An administrator of a Hindu estate cannot, I think, be assumed to have powers and rights co-extensive with those of an administrator of an European's estate. The latter (when these entitled to him in preference, being duly cited, omit to take out administration) obtains letters of administration, by virtue of which he becomes to all intents and purposes, and exclusively, the legal personal representative of the intestate; and inasmuch as up to the date of the grant there has been no such legal representative, his interest does not vest merely at and from the time of the grant, but is for most purposes carried back by relation to the time of the intestate's death. Letters of administration were not, until the passing of Act XX. of 1841, essential to the title of the representative of a Hindu intestate, for any purpose. That Act seems to me rather to be designed in aid and for the security of debtors, than to make any alterations in the nature of succession and representation among Hindus. It says that, except in cases where the opposition is obviously frivolous, no debtor to the estate shall be compelled to pay to a person not clothed with letters of administration or a certificate obtained under that Act, and that a debtor shall in all cases be safe in paying to a person acting under letters of administration or a certificate duly obtained; but it does not cast upon the next of kin of a Hindu intestate the obligation of perfecting his title to representation by letters of administration or a certificate, so as to enable (upon his failure to do so) any other person to acquire that exclusive character. It does not say that, until administration or a certificate is taken out, the estate of the intestate shall be treated as unrepresentative."

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sented, and thus afford a ground for the application of the doctrine of relation derivable from the English law of succession. These distinctions, as to their nature and effect, between letters of administration to Hindu estates, and those granted in the ordinary course to the estates of Europeans, seem to me to bear materially both upon the title of the plaintiff, and the nature of the liability with which the bill seeks to affect the defendants. They affect the plaintiff's title, because they show that she cannot be regarded as exclusively the legal personal representative of the deceased, and can still less be regarded as having been so ever since the death of the intestate. They affect the question whether the defendants can be treated as executors *de leur tort*, because the law only affects with that peculiar liability those who intermeddle with the assets of a deceased in the absence of any personal representative of right, and in this case there has been no such absence. The deceased has been, in contemplation of law, fully represented from the time of his death. His creditors, the day after his death, might have sued his widow as his legal representative."

I have made these long extracts from the judgments of Peel, C. J., and Colvile, J., in that case, because they seem to me to describe, with perspicuity which it would be difficult to equal, the legal *status* of the administrator of a Hindú.

In the goods of Budderoonissa (o), Peel, C. J., in 1851 (in refusing letters of administration to the creditor of a female convert to the Muhammadan faith who had died without leaving any next of kin, and to whose property the Crown, therefore, was entitled as *ultimus hæres*) said: "The foundation of the jurisdiction to administer the estates of Natives is consent; this has been the settled doctrine of this court since the decision in *Beebee Muttra's Case*. It is true that the reason for that rule applies only where there are Native representatives, whose title such administration would vary and displace. The statute (21 Geo. III., c. 70, s. 17)

is imperative that the succession *ab intestato* to natives (Muhammadans and Hindús) must be regulated by their own law. Here, however, there is no title or estate of a Native to displace, but then the consent of the Crown is necessary by the practice of the English Courts of Probate, and that has not been obtained."

The power even of an executor under the will of a Hindú is limited: *Srimati Dossee v. Tarachurn Chowdry* (p); *Sharo Bibi v. Baldeo Das* (q); *Srimati Jaykali Debi v. Shibnath Chatterjee* (r); *Nilkant Chatterjee v. Peari Mohan Das* (s).

Of Act XX. of 1841 (the legal effect of which is stated with so much lucidity by Peel, C.J., and Colvile, J., in the passages above extracted from their judgments), Sec. 14 enacted: "That all probates and letters of administration granted by any of Her Majesty's Courts in cases in which any assets belonging to deceased persons were, at the time of their deaths, within the local jurisdiction of the court granting the probate or letters of administration, shall have the effect of probate and letters of administration granted in respect of the property of British subjects, *but for the purpose of the recovery of debts only, and the security of debtors paying the same*; except so far as is in this Act provided."

That Act was repealed by Act XXVII. of 1860, which, however, re-enacted the most important provisions of the repealed Act. Sec. 18 of Act XXVII. of 1860 is nearly *verbatim* the same as Sec. 14 of Act XX. of 1841. Neither of these Acts applied to British subjects.

Stat. 9 Geo. IV., c. 33 (Ferguson's Act), which empowered executors and administrators to sell real estate for the payment of debts of the deceased owner, did not apply to Hindús. That statute, having been rendered unnecessary by the Indian Succession Act, 1865, was repealed by the general repealing Act, XIV. of 1870.

The 33rd section of the present Act, regulating the office of Administrator General (XXIV. of 1867), has been relied

p) Bourke Calc. Rep., Pt. II., 38. (q) 1 Beng. L. Rep., 24 O. J.
(r) 2 Beng. L. Rep., 1, 4, O. J. (s) 3 Beng. L. Rep., 7 O. J.

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on in favour of his present application. Its effect has been likened by his Council to Sec. 49 of the Indian Insolvent Debtors' Act (Stat. 11 & 12 Vict., c. 21). That section (33 of Act XXIV. of 1867) is as follows :—

“If any suit shall be brought by a creditor against any Administrator General in his representative character, the plaintiff shall be liable to pay the costs of the suit, and shall not be entitled to have the decree (if any) in such suit enforced, unless upon proof, by affidavit or otherwise, that, not less than one calendar month previous to the institution of the suit, he had applied in writing to the Administrator General, stating the amount and other particulars of the claim, and supporting the same by such evidence as, under the circumstances of the case, the Administrator General was reasonably entitled to require, and that the Administrator General had refused or neglected to register the claim according to the practice of his office. If, in any such suit, judgment is pronounced in favour of the plaintiff, he shall, nevertheless, be only entitled to payment out of the assets of the deceased *pari passu* with the other creditors.”

That section is, however, for the following reasons, wholly inapplicable to the present case :—

1stly—These actions were not brought against the Administrator General.

2ndly—He did not represent the deceased Govind Gir-dhar, or his estate, when these actions were commenced; and, therefore, the application in writing, required by that section to be made to the Administrator General one calendar month previous to the institution of any suit, could not properly have been given to him, and would have been futile if it were given.

It is unnecessary for me in this case to consider whether the 17th section of the same Act (XXIV. of 1867) confers on the Administrator General, when letters are granted to him under that section, any greater authority or estate than an ordinary administrator of the estate of a Hindú would have. That section relates to cases in which the court has been satisfied that danger is to be apprehended of misappropriation, deterioration, or waste of the assets, whereupon the court directs the Administrator General to apply for letters of administration. That is not the present case. The Judge

did not direct the Administrator General to apply for letters. The Administrator General himself applied for them, at the desire of the widow, as expressed in her solicitor's letter addressed to the Administrator General, and appended to his petition for letters: and it appearing from that petition and the solicitor's letter that the widow abdicated her right to represent her deceased husband, in her capacity of heir and next of kin, in favour of the Administrator General, the Judge made the fiat that letters should go to the Administrator General. Under these circumstances he appears to me to have no higher authority over, or estate in, the property of Govind Girdhar, than any ordinary administrator would have over or in the property of a deceased Hindú, whatever that authority or estate may be.

Assuming, but not by any means deciding, that such an ordinary administrator would have, and that the Administrator General in this case has taken under the letters, as full an estate and authority as an administrator in England would take under general letters of administration, as in case of intestacy, I think that the Administrator General cannot succeed in his present application.

In England, if a defendant die after judgment has been given against him, and before execution, the plaintiff may proceed by writ of *scire facias* upon the judgment in order to enforce it against the administrator: 2 Wms. Exors. 1702 (4th ed.). The latter is limited to certain pleas in defence, such as that he never had in his hands any assets of the deceased, or that he has already duly and fully administered all such assets as he did receive, or a release, or payment, or levy of the amount of debt or *nul tiel record*.

But it would be no defence were he to plead that the deceased owed other debts beside the debt due to the plaintiff, and that the total amount of the debts exceeded that of the assets, and that he (the administrator) was ready and willing and offered to pay the plaintiff rateably with the other creditors, but could not pay him in full. For in England a judgment-creditor must be preferred to a simple contract-

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creditor (*t*), and, where there are several judgment-creditors, he, of them, who first sues out execution must be preferred: 2 Wms. Exors. 862 (4th ed.). Of course I am not now speaking of a case in which there is an administration suit in Equity, but merely of actions brought by individual creditors, such as those in the present instance.

The procedure in this country analogous to that of *scire facias* on a judgment is prescribed by Sec. 210 of the Civil Procedure Code, which enacts that "if any person against whom a decree has been made shall die before execution has been fully had thereon, application for execution thereof may be against the legal representative or the estate of the person so dying as aforesaid; and if the Court shall think proper to grant such application, the decree may be executed accordingly."

This last passage is not to be understood as giving the court an unlimited discretion to grant or refuse execution. It could only refuse in a proper case, *e.g.*, that no assets have come to the hands of the representative of the deceased against whom execution is sought, or some such case.

But the judgments here have not been recovered against the deceased, but against the widow as his heir, according to Hindú law, in respect of his debts respectively due to the plaintiffs. And it is said, 1st, that the letters of administration must be considered as taking effect on the day (the 9th of January) on which the Judge filed the petition asking for them, and that the decrees, not having been made until the 11th of January, were not made against a person who then was the representative of the deceased, inasmuch as the widow's estate must be regarded as divested on the 9th of January by the order for the grant of letters to the Administrator General. Assuming, but not deciding, that the letters of administration, here granted with the assent of the heir (the widow), would have the effect of divesting her estate,

(*t*) But as to cases in India falling within the Indian Succession Act (which does not apply to Hindús, Buddhists, or Muhammadans), see that Act, Sec. 282.

and fully substituting the Administrator General for her as representative of the deceased, yet I cannot for a moment hold that the mere order that letters should issue is equivalent in force to the letters themselves. The difficulty with ordinary persons in finding sureties sometimes prevents a party, who has obtained an order for the issue of letters, from ever completing his title by taking out the letters themselves. Other circumstances also are sometimes attended with a similar result. It might sometimes happen that the Administrator General himself, after obtaining an order for letters, might find that it was desirable at that stage to hold his hand, and not to take out the letters. Infinite confusion might follow were the court to hold that an order for letters was equivalent to the letters themselves. Persons might thus become administrators who had not given security, or against their will. But, *2ndly*, it is said that the letters, whenever issued, relate back to the death of Govind Gir-dhar, and override the decrees obtained against the widow. Although in England in the case of an executor the probate relates back to the testator's death, as the executor's interest is derived from the will (*u*), yet, as an administrator derives his title wholly from the court, he has none until he has sued out letters of administration: *Woolley v. Clark (v)*; *Rex v. Smith (w)*; and per Tremaile, J., Year Book 4 Hen. VII., p. 14; Bro. M., tit. Administrator 7; 1 Wms. Exors. 526, 527 (4th ed.). In some respects that proposition must be taken with some qualification; and for some purposes, no doubt, letters of administration have been allowed to relate back, as in the case of unlawful acts (Wms. Exors. 528) (*x*), but not to defeat lawful acts or legally vested rights: *Ibid.* 529, 530.

In the already-cited case, *Mohar Ranee Essadah Bai v. The East India Company (y)*, which is directly applicable on this point, Peel, C. J., said: "The plaintiff's title cannot be carried back by relation, since the representation has always

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(*u*) And see Indian Succession Act, Sec. 188.

(*v*) 5 B. & Ald. 744. (*w*) 7 C. & P. 147.

(*x*) See 8 Exch. 302; 5 M. & Gr. 760. (*y*) 1 Taylor & Bell, 290.

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been full." And Colvile, J., said : "The deceased has been in contemplation of law, fully represented from the time of his death. His creditors, the day after his death, might have sued his widow as his legal representative." So here, from the moment of the testator's death at the very least, up to the 27th of January, the date of the letters of administration, and the day on which they were issued (a period covering the institution of these suits, the laying on of the attachments before judgment, and the recovery of the judgments themselves), the representation was full. It was filled by the widow, who took as heir, and, although a Hindú widow's estate in immoveables inherited from her husband, which has been compared to that of a tenant in tail after possibility of issue extinct (z), she may alien only under very special circumstances, and although she may be restrained by injunction from committing waste (a), yet she does fully represent the inheritance even in that kind of property (b). Peel, C.J., once described her estate thus : "The estate, although sometimes so expressed to be, is not an estate for life : when a widow alienates, she does so by virtue of her interest, not of a power, and she passes the absolute interest which she could not do if she had not a life-estate, in quantity. There is no ground for altering the nature of the estate. It devolves as an estate by inheritance under the Hindu law, and is the estate which passed from the late owner : nothing is in abeyance. The incapacity to alienate is not in any way inconsistent with an inheritance" (c). And then he instances estates tail after the statute *de donis* and until the invention of recoveries, and other estates of inheritance which are not alienable ; and I may add that of a Hindú, entitled to ancestral lands of inheritance, who, after he has male issue, and while they are living, is unable to alienate their inchoate shares in the lands which he holds undoubtedly as of inheritance. Peel, C. J., continues : "Nor does the fact that the next taker takes as heir to a prior

(z) *Ibid.* 372.

(a) 2 Taylor & Bell, 279 ; 1 *Ibid.* 370. See Boulnois' Rep. 120.

(b) 2 Morley's Dig. 105, 111, 198, 210, 215 ; Fulton R. 133, 135.

(c) 2 Taylor & Bell, 281.

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owner, and not to the immediate predecessor, furnish any reason for holding the estate a mere life-estate. It is, however, for purposes of alienation unwarranted by Hindú law, no greater an estate; and in one respect it is less beneficial than a life-estate under the English law, since the accumulations on the death of the female heir pass, not to her heir, but go with the principal. Whenever, in legal decisions or in text-writers, the estate is described as one for life, nothing more is meant than a reference to the usufruct and the power of disposition, where the exceptional power of disposition is not properly exercised. The estate is not held in trust, express or implied. It is a restrained estate: not a trust estate" (d). In her husband's moveable property at this side of India she takes an absolute estate, subject to payment of her husband's debts (e).

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In *Ramchandra Tantia Das v. Dharmo Narayen Chuckerbutty* (f), a Full Bench recently held at Calcutta that the interest of an heir, expectant on the death of a widow in possession, is so mere a contingency, that it cannot be regarded as property, and, therefore, is not liable to attachment and sale under Sec. 205 of the Civil Procedure Code.

In England, if a judgment had been recovered in respect of a debt due by a deceased person against his executor, and the latter were to die before execution had, and administration *de bonis non* of the original deceased were granted to another person, it could not for a moment be contended that on due steps for the purpose being taken in England by *scire facias*, or even here by a procedure similar to that prescribed in Sec. 210, Civil Procedure Code, execution might not be had against the unadministered estate of the original deceased in the hands of the administrator *de bonis non*. It would be absurd to argue that in such a case the claims of the judgment-creditor should be defeated, and the letters of administration suffered for that purpose to relate back to the death of the testator.

(d) *Ibid.* 281, 282. (e) 1 Bom. H. C. Rep., 118, 130.

(f) 7 Beng. L. Rep. 341.

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The heir (the widow) at the time of the making of the decrees in these suits, at the least, as fully represented Govind Girdhar and his estate, as the executor represents that of the original deceased in the case just put.

Bombay Reg. VIII. of 1827, which, though not expressly so, was in fact mainly passed for Hindús and Muhammadans in the Mofussil of this Presidency, carefully recognises the right of the heir to represent the estate, and to administer it, without any curial sanction, should such be his desire; and the same principle guided a Full Bench of this court on its Appellate Side to its recent decision in *Purshotam Mansukh*, nephew and certified heir of *Kushandás Bhagvándás v. Ranchhod Purshotam (g)*.

For these reasons, I have come to the conclusion that if the plaintiffs in these suits take the proper steps to obtain execution of their decrees against the estate of Govind Girdhar, I could not properly, in respect of any circumstance which has been as yet brought to my notice on behalf of the Administrator General, refuse to grant such execution; and I, therefore, think that his application to remove the attachment before judgment, laid on certain portions of the moveable estate, is unsustainable, and that the cause shown on behalf of the plaintiffs respectively against each summons must be allowed, and the summons itself discharged. But, as the case was one of difficulty and importance in the questions involved in it, and the conduct of the Administrator General marked with complete *bona fides*, I give no costs against him personally. The plaintiffs must have their costs out of the estate of the deceased, and the Administrator General will also be entitled to reimburse himself to the extent of his costs out of any surplus of that estate, left after satisfying the decrees in these suits, which has come or may come to his hands.

Order accordingly.

(g) *Post*, A. C. J. 152.

*Suit No. 375 of 1871.*1871.
Sept. 11.

RATANSI PANCHA'M.....*Plaintiff.*
 CHARLES SAUNDERS.....*Defendant.*

Service of Summons—Recognised Agent—Carrying on business for and in the name of Principal—Ship's Agents—Civ. Proc. Code, Sec. xvii., cl. 2.

Messrs. R., S., & Co., European merchants, carrying on business in Bombay, received a letter from the owner of the ship "Rialto" by which Messrs. R., S., & Co. were constituted agents to obtain freight for the "Rialto" on a voyage from Bombay to Liverpool, the ship being placed in their hands for that purpose. Acting on this letter, Messrs. R., S., & Co. obtained freight for the "Rialto," signing the shipping orders in their own name as Agents for the Master of the "Rialto." Messrs. R., S., & Co. held no other authority from the owner of the "Rialto" than that contained in the above letter.

Held that Messrs. R., S., & Co. did not carry on business for and in the name of the owner of the "Rialto," and were not, therefore, his recognised agents within the meaning of Sec. xvii., cl. 2, of the Code of Civil Procedure, to accept service of a summons on his behalf in respect of a cause of action that arose out of the loading of the "Rialto."

Whether, in order to constitute a recognised agent within the meaning of the above section, the business carried on by him must be continuous, and not an occasional or desultory business—*Quære.*

Semble. A Bombay firm simply employed by the owners of a ship visiting Bombay to procure freight for her for a particular voyage cannot, under ordinary circumstances, be regarded as carrying on business in the name of the owners of such ship.

THIS was an application on behalf of Messrs. Ritchie, Steuart, and Co. to have the service of the summons in the above suit, and the notice to file a written statement, that had been served upon them as the recognised agents of the defendant, set aside.

The application was made by way of summons taken out in Judge's chamber. The summons so taken out was by the sitting Judge referred into court to be heard before two Judges. The circumstances under which the application was made are fully detailed in the judgment of the Court.

The question involved in the summons came on for argument before WESTROPP, C.J., and BAYLEY, J., on the 20th of July 1871.

Atkinson, Serjeant, showed cause against the summons, and contended that Messrs. Ritchie, Steuart, and Co. were

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the recognised agents of the owners of the "Rialto," within the meaning of Sec. xvii., cl. 2, of the Code of Civil Procedure, and that, therefore, the summons in the suit had been properly served upon them. He relied upon the case of *Rájá-rám Govindrám v. Brown (a)*.

Farran, in support of the summons, contended (I.) that the recognised agency of Messrs. Ritchie, Steuart, and Co. (if it ever existed) ceased upon the sailing of the "Rialto" from Bombay; and (II.) that Messrs. Ritchie, Steuart, and Co. never were the recognised agents of the owner of the "Rialto," as they never carried on business for him and in his name.

Cur. adv. vult.

WESTROPP, C. J. :—The plaint, which was filed on the 29th of April last, describes the plaintiff in this suit as a Hindú merchant residing in Bombay, and the defendant as a "European merchant residing at Liverpool, but employing in Bombay, as the plaintiff is informed, and believes to be true, Messrs. Ritchie, Steuart, and Co., European merchants, carrying on business within the Fort, as his duly recognised agents." The plaint states that "the suit is instituted by the plaintiff for the recovery of the goods, hereinafter mentioned, in specie, or their value, if not returnable in specie, together with such compensation in damages as the Court may award to him for the wrongful acts of the defendant, hereinafter more particularly mentioned;" that in March last "the plaintiff was the owner of 112 bales of cotton which he was desirous of shipping to Liverpool. At that time the defendant was owner of a ship called 'the Rialto,' then lying in Bombay harbour, and taking in a general cargo for Liverpool;" that "on the 24th of March 1871 the plaintiff, at the request of the defendant's agents, and for hire and reward to the defendant in that behalf, shipped on board of the said vessel, for the purpose of being conveyed to Liverpool," 48 bales, part of the said cotton, and on the 4th of April the residue thereof, 64 bales, which two shipments the commanding

(a) 7 Bom. H. C. Rep., O. C. J. 111, *in notis*.

officer, Thomas Cooper, duly had and received on board for the purpose aforesaid, and undertook on behalf of the defendant to convey from Bombay to Liverpool, and gave receipts for them. That "on or about the 11th of April 1871 it was communicated to the plaintiff in effect that the said 64 bales were in a condition unsafe and unfit to be sent on to their destination. The communication was accompanied with a request to remove them. Thereupon a survey was held, and they were found to be in the condition described, of which the plaintiff up to the time of such communication was wholly and entirely ignorant, and which he would not, nor did, believe until such state was confirmed by the surveyor's report." The plaintiff next averred his willingness, on the 17th of April, to receive back the 112 bales, but that the defendant insisted on carrying the 48 bales to Liverpool and on relanding the 64 bales in Bombay. The plaint, passing over several letters which are annexed to it, sets forth a letter dated 18th April 1871, from Messrs. Manisty and Fletcher, solicitors, written to the plaintiff's solicitors on behalf of the Master of the "Rialto," informing the former that the 64 bales would be delivered to the plaintiff upon his handing over the receipts for the same and paying Rs. 197—expense incurred, as shown by a bill annexed to the letter, in taking the 64 bales on board and in stowing them, and afterwards in removing 540 other bales in order to reach the 64 bales, and restoring the 540 bales and discharging the 64 bales into boats, and in employing a surveyor and in law expenses. The same letter also stated that if the plaintiff failed to remove the 64 bales by noon on the next day, they would be landed in the afternoon of that day at the plaintiff's expense and risk, and placed in Messrs. Ritchie, Steuart, and Co.'s godowns, where they would be sold on the 20th of April then instant to defray expenses (likewise at the plaintiff's risk), as the "Rialto" would sail on the following day. As to the 48 bales, the letter stated that they were of a quality differing from that of the 64 bales, and the Master was prepared to keep them on board. The plaint next alleged that on the 20th of April 1871 the plaintiff was ready and willing, and by his agent requested the mate of the "Rialto," to deliver to the

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plaintiff the 64 bales, "but this also was positively refused unless on payment in cash of Rs. 500," which, by advice that the demand was "unjust and illegal," the plaintiff refused to do. Lastly the plaintiff averred that on the 20th of April the 64 bales were, as the plaintiff is informed and believes, "relanded by the defendant's agents, and advertised for sale by public auction as unmerchantable cotton, and the same were afterwards, about 4 P.M. on the 24th of April 1871, without the leave and license and against the will and consent of the plaintiff, sold by them by public auction as unmerchantable cotton;" that the sale was conducted with so much negligence that the cotton produced but little; that no account-sale has been rendered to the plaintiff, and that the proceeds of sale remain "in the hands of the defendant or his agents." The plaintiff prays a return in specie of the 64 bales (if unsold), and if sold, payment of their value, and a decree that the proceeds of the sale belong to the plaintiff, compensation for the wrongful detention of the 48 bales, and for negligence in the sale of the 64 bales, an account-sale and payment over of the proceeds and costs.

The summons, and notice to file a written statement in defence, were, on the 2nd of June, served upon Messrs. Ritchie, Steuart, and Co., of Bombay, at their office, as alleged agents of the defendant. Upon the 3rd of July 1871 a summons was obtained by Messrs. Ritchie, Steuart, and Co., from my brother Bayley in chamber, calling upon the plaintiff to show cause why the service of the original summons in the suit, and the notice to file written statement, should not be set aside. The summons in chamber was obtained upon an affidavit sworn on the 30th of June last by Mr. J. L. Smith, partner in the firm of Messrs. Ritchie, Steuart, and Co., in which, after mentioning the service of process upon his firm, he stated as follows:—"The circumstances under which the plaintiff makes his claim are set forth in the plaint filed herein. I submit that my firm are not recognised agents of the defendant within the meaning of the Civil Procedure Code. They have not any authority from the defendant to accept service of summonses on his behalf, nor do they

carry on business in Bombay for or in the name of the defendant, nor have they had any authority to act for the defendant, save and except that contained in a letter of advice, hereunto annexed and marked C, whereby the ship 'Rialto' was consigned to their care, and all authority under the said letter ceased upon the sailing of the said ship on the 26th day of April last, and before the service of the summons in this suit." Whether that authority did, for all purposes, cease at the time supposed by Mr. Smith, is a question of law rather than a question of fact. The material part of the letter of Messrs. Charles Saunders and Co., the defendant's firm, dated Liverpool, 5th January 1871, and addressed to Messrs. Ritchie, Steuart, and Co., is as follows :—

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"Our ship 'Rialto' sailed hence for your port 26th October last, with a cargo of coals for the P. & O. Company, and, in accordance with the arrangement made here with your friends Messrs. Finlay, Campbell, and Co., we send to your care a letter for Captain Babot directing him to place the ship in your hands. Please see that the letter is delivered to him immediately on his arrival. We look for good freights ruling at your port to this, and hope that you will secure a cargo for her at 50s. per ton at least, with dispatch. But consult with Captain Babot on the subject. Don't consider this as a limit, but do the best you can, and if you are in doubt, telegraph and we will reply. Advise us of her arrival by wire, and also employment offering, for our guidance."

The rest of the letter related to a consignment of cotton to Messrs. Charles Saunders and Co. on their own account, and had not any bearing upon this suit.

The plaintiff, in reply to the affidavit of Mr. Smith, filed an affidavit which (*inter alia*) stated that he (plaintiff) was informed and believed that "the whole management of the 'Rialto' was in the hands of Messrs. Ritchie, Steuart, and Co. during the time that she was in Bombay harbour, and the shipping orders for the said ship were issued by Messrs. Ritchie, Steuart, and Co. as agents for the owners,"

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and that, before she sailed from Bombay, he (the plaintiff) transacted business at the office of Messrs. Ritchie, Steuart, and Co., as agents of the owners of the "Rialto," with respect to the cotton shipped by the plaintiff in her, and that he was then informed that Messrs. Ritchie, Steuart, and Co. "had the general management of the said ship 'Rialto,' on behalf of its owners," and that when he was at that office a few days before the "Rialto" sailed, a European clerk in the office informed him that the 64 bales had been landed at Carnac Bandar by his masters' orders, and would be delivered to the plaintiff on payment of certain charges which he denied his liability to pay, but which Ritchie, Steuart, and Co. required him to pay; and that he was informed and believed that the auction-sales of the 64 bales were conducted by Crawford and Co. by the direction of Ritchie, Steuart, and Co. as agents for the owners of the "Rialto;" and that the bales sold were delivered to the purchasers, and the proceeds of sale were received by Ritchie, Steuart, and Co. as such agents for the owners of the "Rialto."

The letters annexed to the plaint and to the affidavits were read and commented upon by counsel at both sides. It is not material for the purposes of the present application to state their contents; it is sufficient to say that the letters of the 11th, 14th, and 18th of April were addressed to the plaintiff, or his solicitors, by Messrs. Manisty and Fletcher, and purported to be written on the instructions of the Captain of the "Rialto." All these letters required the plaintiff to remove the 64 bales, and informed him that if he did not they would be landed at his risk and expense. The two last of those letters also menaced him with a sale of the bales if he did not pay the expenses connected with them; and the last of them stated that they would be placed in Messrs. Ritchie, Steuart, and Co.'s godown for that purpose. There were also two letters, respectively dated the 11th and 24th of May, addressed to the plaintiff by Ritchie, Steuart, and Co., of which the former notified to him that 53 of the 64 bales were then lying at Carnac Bandar at his risk and expense, and that the other 11 had been sold to defray

expenses, &c. "up to the 'Rialto's' departure;" and that the 53 bales would be delivered to him on application at their office and on payment of all expenses incurred. The letter of the 24th of May was much to the same effect, and contained a menace of sale of the 53 bales if delivery were not taken within eight days. This letter the plaintiff said he did not receive, but a duplicate of it was forwarded to, and reached, him on the 1st of June, together with a letter from Messrs. Manisty and Fletcher, on behalf of Ritchie, Steuart, and Co., calling on him to take delivery within four days, or that the 53 bales would be sold by public auction within four days.

In a second affidavit made by Mr. Smith on the 14th of July last, he stated that "the unsold bales were left lying on the Carnac Bandar, where they were landed, but as they were not removed by the plaintiff, the Government Inspector removed them into a godown and gave notice that he would hold my firm (Ritchie, Steuart, and Co.) responsible for the rent;" and therefore it was that the letters of the 11th and 24th of May and 1st of June were written to the plaintiff.

It has been denied that Messrs. Ritchie, Steuart, and Co. are the recognised agents in Bombay of the defendant in Liverpool within the meaning of Sec. 17 of the Civil Procedure Code. While it is admitted that the cause of action (if any) arose in Bombay, and, therefore, that there is jurisdiction in this court to entertain this suit, yet it is contended that there is not any person in Bombay on whom service of process can be had, and that Messrs. Ritchie, Steuart, and Co., who do not hold any general power of attorney from the defendant authorising them, within cl. 1 of Sec. xvii. of the Civil Procedure Code, to apply or appear on his behalf, did not, at the time of the institution of this suit, and within the meaning of cl. 2 of the same section, carry "on trade or business for and in the name of" the defendant, who is not personally within the jurisdiction. My brother Bayley, deeming the question of importance, adjourned it from chamber into court for argument before two Judges, and it has, accordingly, been argued before him and myself.

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We have examined the following cases as to the meaning of the words "carry on business" in the 12th clause of the Letters Patent relating to jurisdiction. *Frámji Kárasji Marker v. Hormasji Kárasji Marker* (a), in which the mere purchase of goods by the defendant's agent in Bombay for sale by the defendant, a retail dealer up country, was held not to confer jurisdiction on this court. That decision turned upon the circumstance that the sale was not to take, and did not take, place in Bombay, the court being of opinion that in the instance of a retail dealer, the place of sale must be considered as the place of carrying on business. In *Subharaya Mudali v. Cunliffe* (b) it was held that the words "carry on business" in cl. 12 imply a personal and regular attendance to business within the local limits of the Letters Patent; and in *Chinnammal v. Tulakannatammal* (c) occasional sales of grain by the defendant, a Mofussil trader, through a general broker in Madras for commission received from the purchasers, it was ruled, did not give the High Court jurisdiction over the defendant, Scotland, C. J., being of opinion that in order to give such jurisdiction "the defendant should, at the time of the commencement of the suit, carry on, within the local limits of the court's jurisdiction, some independent regular business in person, as in the case of *Mitchell v. Hender* (d), or at an office or other fixed place of business (see *Rolfe v. Learmouth*) (e) either personally, or by clerks or servants employed by the defendant, and conducting the business under his control and in his individual or partnership name"—observations which ascribe a wider scope to the words "carry on business" than the previous remarks in 1 Mad. H. C. Rep. 286 requiring a personal and regular attendance to business. Perhaps the strongest case against the jurisdiction is *Harjiban Das v. Bhagwan Das* (f). It seems to require that there should be an element of permanency in the business, and to go far beyond the Bombay case which we have first mentioned. In consequence of the view which we take of the present case,

(a) 1 Bom. H. C. Rep. 220. (b) 1 Mad. H. C. Rep. 286.

(c) 3 *Ibid.* 146. (d) 23 L. J., N. S., Q. B. 273.

(e) 14 Q. B. 196. (f) 7 Beng. L. Rep. 102.

it is unnecessary for us to say whether we should follow that Calcutta case.

Cl. 2 of Sec. xvii. of the Civil Procedure Code requires not only that the agent should carry on business for his principal, but that the agent should carry on such business "in the name of" the principal.

We are quite satisfied that Messrs. Ritchie, Steuart, and Co. were by the letter of Messrs. Charles Saunders and Co. (marked C and annexed to Mr. Smith's affidavit) fully constituted their agents to obtain freight for the "Rialto," and we think that it was while acting as such agents Messrs. Ritchie, Steuart, and Co. claimed, in that capacity, a lien on the 64 bales for the expenses incidental to and consequent upon the discharge of those bales from the ship, and for putting and keeping them on shore; and we are not satisfied that the agency ceased upon the sailing of the ship from Bombay, or that it does not continue, as regards the 64 bales or the unsold portion of them detained by Ritchie, Steuart, and Co., and perhaps as to the proceeds of those which were sold, until the present moment; if so, this case would not fall within *Mokha Harukraj Joshi v. Biseswar Doss* (9), in which it was held that the *gumástá* of a firm ceases to be a recognised agent, within cl. 2 of Sec. xvii., when the business of the firm has ceased before the institution of the suit. But, even assuming this to be so, we find ourselves quite unable to hold that Ritchie, Steuart, and Co. have been or are carrying on business, in respect of the matters the subject of this suit, *in the name of* the defendant, Charles Saunders, or of Charles Saunders and Co., although they (Ritchie, Steuart, and Co.) have been carrying on business for Charles Saunders and Co. Putting aside the question as to whether the business carried on by the agent must be a continuous, and not an occasional or desultory business, in order to render the agent a recognised agent within cl. 2 of Sec. xvii. of the Civil Procedure Code, we cannot find any evidence that Ritchie, Steuart, and Co. carried on business in the name of Charles Saunders and Co. In the three shipping orders produced at our desire they sign their firm's

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name as "Agents for the Captain," and do not disclose the name or names of the owners—a circumstance which distinguishes this case from that mentioned in the note at page 111 of 7 Bom. H. C. Rep., O. C. J., and which, therefore, renders it unnecessary for us to discuss that decision. We are inclined to think that a Bombay firm simply employed by the owners, resident in England, of a ship visiting Bombay, to procure freight for her for a particular voyage, cannot, under ordinary circumstances, be regarded as carrying on business in the name of the owners, and, therefore, cannot be deemed recognised agents of the owners within cl. 2 of Sec. xvii. of the Civil Procedure Code.

The cause shown by the plaintiff must, accordingly, be disallowed, and the service upon Messrs. Ritchie, Steuart, and Co. of the original summons in this suit, and of the notice to file a written statement, must be set aside with costs.

As to the case, *Lutchmeput Dogare v. Sibnarain Mundle*, cited to us from 1 Hyde 97, where it was held that a partner could not be treated as the recognised agent of his copartner (*h*), we do not wish to express any opinion at present.

As to how far the captain of a foreign vessel trading to an Indian port can be said to dwell, carry on business, or work for gain within the meaning of the Small Cause Court Act, a reference to *The Queen v. The Judges of the Small Cause Court in re Williams v. Smith* (*i*) may be useful.

Attorneys for the plaintiff: *Shapurji and Thákurdás*.

Attorneys for Messrs. Ritchie, Steuart, and Co.: *Manisty and Fletcher*.

(*g*) 5 Beng. L. Rep., Appx. 11 S. C.; 13 Calc. W. Rep., Civ. R. 345.

(*h*) Vide contra *Ramchundra Bose v. Snead*, 7 Beng. L. Rep., Appx. 58.—ED.

(*i*) 2 Taylor & Bell 4.

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MEGJI HANSRA'J *et al.* *Plaintiffs.* 1871.
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*Attachment of Debt—Equitable Assignment prior to Attachment—
Notice—Assignee for Value without Notice—Judgment-Creditor—Attach-
ment on Funds of Debtor, expected to reach hands of a third person, invalid—
Assignment of Funds, expected to reach hands of a third person, valid—
Stamp.*

A creditor, who attaches a debt due to his judgment-debtor, is not in the same position as an assignee for value of such debt without notice of a prior assignment, but in respect to prior assignments stands in no better position than his judgment-debtor. An assignment prior to attachment that is good against the judgment-debtor is also, as a general rule, good against his attaching creditor.

Notice to the holder of funds is not necessary to complete, *as against the assignor*, an equitable assignment of such funds.

In August 1870 Rámji Joitá signed and gave to Messrs. F., S., & Co. a letter addressed to Messrs. Ewart, Latham, and Co., by which he "requested them to pay over to Messrs. F., S., & Co. any surplus proceeds of his consignment of one hundred bales per 'Aurora,' after recovery from the underwriters of the amount due under a policy of insurance" (which had been effected on the hundred bales), after making certain deductions.

This letter was given to Messrs. F., S., & Co. in consideration of a pre-existing debt.

On the 8th of August 1870 Messrs. F., S., & Co. sent the letter to Messrs. Ewart, Latham, and Co., with a request that they should act upon it.

The surplus proceeds of the insurance of the one hundred bales reached Messrs. Ewart, Latham, and Co. on the 26th of June 1871, and were attached in their hands by a judgment-creditor of Rámji Joitá before they were paid over to Messrs. F., S., & Co.

Held. That Rámji Joitá had validly assigned the surplus proceeds of the hundred bales to Messrs. F., S., & Co., and that such assignment was valid *as against* subsequent attaching creditors.

Semle. That an attachment upon such surplus proceeds before they reached the hands of Messrs. Ewart, Latham, and Co. from the underwriter would have been invalid.

Held. That a letter by which a *chose in action* (a debt) was equitably assigned did not require a stamp where the *chose in action* was not in British India at the time of the assignment.

THIS was a summons taken out by Megji Hansráj and his co-plaintiff in the above suit, calling upon Messrs. Ewart, Latham, and Co. to show cause why they should not pay to the plaintiffs the amount of their decree and costs, amounting to a sum of Rs. 2,025, out of a sum of Rs. 5,149 in the hands of

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Messrs. Ewart, Latham, and Co., and alleged to be due to the defendant Rámji Joitá, as surplus proceeds in respect of a consignment of cotton shipped to England through Messrs. Ewart, Latham, and Co., realised on a policy of insurance effected on that consignment. The facts are fully set forth in the judgment of the court.

The 21st para. of the Affidavit of Mr. Reid, alluded to in the argument of counsel and the judgment of the court, was as follows :—

“ After the 23rd of June 1870 I had several interviews with Rámji Joitá, at which I threatened him with legal proceedings unless he gave me security for the repayment of the money advanced to him. One of these interviews took place at my bungalow shortly before the 18th of July 1870. At this interview my partner Walter Lang, my clerk Sorábji Rustamji, and one Dayarám Manchárám were present. I pressed Rámji Joitá then and there either to pay the money which he owed to us, or to give security for the payment of it, and the said Rámji Joitá then and there distinctly stated that he would assign or make over to us the surplus moneys of his consignment per ‘Aurora’ through Messrs. Forbes and Co. and Messrs. Ewart, Latham, and Co., and that, in order to ensure the payment to us of the said moneys, he would sign letters, to be prepared by us, requesting Messrs. Forbes and Co. and Messrs. Ewart, Latham, and Co. to pay the said moneys to us. The said letters could not be prepared there and then, because, as before stated, the interview took place at my bungalow, and I had not the necessary materials at hand.”

Some time after this interview Rámji Joitá left Bombay, and the letter of the 18th of July was sent after him and signed by him in the Mofussil.

The above summons was, by SARGENT, J., adjourned into court, and was argued before WESTROPP, C. J., and SARGENT, J., on the 8th of December 1871.

Farran, on behalf of Messrs. Ewart, Latham, and Co., showed cause.

The Honorable J. S. White (Advocate General) showed cause on behalf of Messrs. Finlay, Scott, and Co. He argued that, under the circumstances stated in para. 21 of Mr. Reid's Affidavit, and by the letter of the 18th of July 1870, Rámji Joitá had made a valid assignment in equity of all his interest in the surplus proceeds of the consignment made through Messrs. Ewart, Latham, and Co. to Messrs. Finlay, Scott, and Co., long before the attachment laid on these proceeds

by the plaintiffs and the other attaching creditors, and consequently that there was, at the time the attachments were laid on, no interest left in Rámji Joitá on which the attachments could operate; that, in order to render the equitable assignment valid as against Rámji Joitá, notice to Messrs. Ewart, Latham, and Co., after the surplus proceeds had reached their hands, was not necessary, and that the assignment being valid against Rámji Joitá was valid against his attaching creditors, who did not occupy the position of *puisne* assignees of Rámji Joitá for value and without notice of the prior assignment, but stood in the same position as Rámji Joitá himself. He commented on the several cases cited by Bayley, J., in his judgment in the case of *Lálji Ladhá v. Rámji Joitá*,* and argued that that case had been wrongly decided.

Marriott, for the second attaching creditors, Purshotam Lakhmidás and others, relied upon the judgment in *Lálji Ladhá v. Rámji Joitá*. He also contended that if there were an equitable assignment made by Rámji Joitá, it was made by the letter of the 18th of July 1870, as the prior negotiations between Rámji Joitá and Finlay, Scott, and Co. had not resulted in a definite agreement, and that the letter of the 18th of July could not be used as an assignment, as it was not stamped as such.

The Honorable A. R. Scoble followed for the plaintiffs.

Cur. adv. vult.

WESTROPP, C.J. :—The plaintiffs (who are judgment-creditors in this cause of the defendant, Rámji Joitá) obtained, on the 17th of November last, a Judge's summons, calling upon

* In this case *Bayley*, J., decided that an equitable assignment made by Rámji Joitá to Messrs. Finlay, Scott, and Co., under circumstances similar to those in the present case, was invalid, because no notice of it was given to Messrs. Forbes and Co. before the attachment was laid on by the plaintiff, Lálji Ladhá, as the letter of the 18th of July 1870 was sent to them (Messrs. Ewart, Latham, and Co.) before the surplus proceeds had reached their hands, and, therefore, did not amount to a notice of the assignment. He relied in his judgment upon the following cases :—*Buller v. Plunkett*, 1 John & H. 441; *Webster v. Webster*, 31 Beav. 393; *Somerset v. Cox*, 33 Beav. 634; *Earl of Suffolk v. Cox*, 36 L. J., Ch. 591. See this judgment, referred to *post*, p. 173.

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Messrs. Ewart, Latham, and Co., of Bombay, to show cause (if any they had) why they should not pay to the plaintiffs the amount of the decree and costs in this cause (Rs. 2,025) out of the sum of Rs. 5,149 in their hands, and alleged to be due to the defendant, Rámji Joitá, as surplus proceeds in respect of a consignment of cotton shipped to England by the "Aurora," realised upon a policy of assurance effected on that consignment. The "Aurora" and her cargo were destroyed at a distance of fifty miles from Bombay by fire when on her voyage to England, and under circumstances too well known to need description.

The defendant, being under heavy liabilities (about Rs. 23,000) to Messrs. Finlay, Scott, and Co., of Bombay, under circumstances set forth in an affidavit made by Mr. Reid of that firm, and being much pressed to make good those liabilities, with a view to do so in part, gave to Messrs. Finlay, Scott, and Co. a letter dated the 18th July 1870, but not actually signed by the defendant, Rámji Joitá, until some day intermediate between that day and the 8th of August 1870. It was addressed to Messrs. Ewart, Latham, and Co., of Bombay, and is as follows :—

" MESSRS. EWART, LATHAM, and Co.,

Bombay.

DEAR SIRs,—I have to request that you will pay over to Messrs. Finlay, Scott, & Co. any surplus proceeds of my consignment of 100 bales of cotton per 'Aurora,' after recovery from the underwriters of the amount due under the policy of insurance, and after deduction of the amount drawn against the said consignment and your usual charges.

I remain, &c.,

RA'MJI JOITA'."

That letter was on the 8th of August 1870 delivered to Messrs. Ewart, Latham, and Co., inclosed in a letter of the last-mentioned date to them from Messrs. Finlay, Scott, and Co. By letter of the same date (8th August 1870) Messrs. Ewart, Latham, and Co. replied to Messrs. Finlay, Scott, and Co., acknowledging receipt of the two foregoing letters, and promising to place them "on record."

On the 9th of September 1870 a prohibitory order, founded on the decree in this cause, was served on Ewart, Latham, and Co. at suit of the present plaintiffs, attaching the same surplus proceeds. Those surplus proceeds had not at that time reached the hands of Ewart, Latham, and Co., and did not in fact reach them until the 26th of June 1871. For this reason the plaintiffs, rightly supposing that their attachment was abortive (7 Beng. L. Rep. 186), sued out another attachment of the same surplus proceeds by way of prohibitory order, which was served upon Ewart, Latham, and Co. upon the 2nd of October 1871.

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In another suit (No. 522 of 1870) brought against the same defendant, Rámji Joitá, Purshotam Lakhmidás, who had obtained a decree for Rs. 4,485 in it, sued out an attachment of the same surplus proceeds by prohibitory order, which was served upon Ewart, Latham, and Co. upon the 2nd of October 1871.

There were certain other attaching creditors of Rámji Joitá, who (as well as those in Suit No. 522 of 1870) have had special notice of the present proceedings. They have not, however, appeared to sustain their claims against the fund the subject of it. It has been stated that their decrees have been otherwise satisfied.

Messrs. Finlay, Scott, and Co. deny that any of the attachments can be sustained as against their claim founded upon the letter of the 18th of July 1870, delivered to Ewart, Latham, and Co. on the 8th of August 1870.

The attaching creditors, who have appeared by counsel, on the other hand, rely upon an elaborate judgment of Mr. Justice Bayley, given in September last, under circumstances in all material points precisely similar to those which exist in the present case. The surplus proceeds in the case before him were those of a policy of insurance upon 150 bales of cotton, consigned by Rámji Joitá to England through Messrs. Forbes and Co., of Bombay. Rámji Joitá had given to Finlay, Scott, and Co. a letter, addressed to Forbes and Co., dated 18th July 1870, directing them to pay over to Finlay, Scott, and

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Co. the surplus proceeds of the 150 bales when realised from the underwriters. That letter was the same in form as the letter in this case addressed by Rámji Joitá to Ewart, Latham, and Co. The surplus proceeds did not reach Forbes and Co.'s hands until April 1871, long after Finlay, Scott, and Co. had caused the letter of Rámji Joitá addressed to Forbes and Co. to be delivered to them. An attachment at suit of *Lálji Ladhá et al. v. Rámji Joitá* (Cause No. 285 of 1870) was, subsequently to the surplus proceeds of the 150 bales reaching the hands of Forbes and Co., laid upon these surplus proceeds. That attachment Mr. Justice Bayley upheld against the claim of Finlay, Scott, and Co., although the letter of assignment was prior in date to the attachment. His decision seems to have rested chiefly on the ground that the notice which Finlay, Scott, and Co. gave of their claim to Forbes and Co. was abortive, because there was not then any debt due from Forbes and Co. to Rámji Joitá, as the surplus proceeds of the 150 bales had not then reached Forbes and Co. He also appears to have thought that the validity of the assignment by Rámji Joitá to Finlay, Scott, and Co. of those surplus proceeds was impeachable under the Stat. 13 Eliz., c. 5.

In the present case, counsel for Finlay, Scott, and Co. admit that the decision of Mr. Justice Bayley is in point as a precedent, but argue that the decision itself is at variance with prior and well-established authorities.

My brother Sargent, before whom this summons came in the first instance, under the above circumstances, adjourned it into court for argument before two Judges. It was, accordingly, argued before him and myself on Friday last.

A creditor may "under his judgment take in execution all that belongs to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor subject to every liability under which the debtor himself held it." So spoke Vice-Chancellor Wigram in *Whitworth v. Gaugain* (3 Hare, 416, 425, affirmed on appeal by Lord Cottenham, C., 1 Phillips, 728). The Vice-Chancellor

continued: "First take the case of an ordinary trust. It could not for a moment be contended that this Court would not protect the interest of the *cestui que trust* against the judgment-creditor of the trustee. The judgment of Lord Cottenham in *Newlands v. Paynter* (a) is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. *Lodge v. Lyseley* (b) is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment-creditor of the vendor. Again, take the case of an equitable charge to pay debts, or legacies, or any other equitable interest except that of an equitable mortgagee, and I apprehend the right of the equitable incumbrancer to be preferred to the judgment-creditor of the debtor, in whom the legal estate of the property charged might be, will be, as indeed it properly was, admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of *Williams v. Craddock* (c), the counsel, as well as the Court, were of opinion that an interest by way of equitable mortgage was entitled in this Court to the same protection against judgments as other equitable claimants." And so, accordingly, it was held in that case of *Whitworth v. Gaugain*, a decision of which Lord St. Leonards, in *Abbott v. Stratten* (d), expressed his approval.

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Inasmuch, then, as the judgment-creditors can only by their attachments take the property of their debtor, Rámji Joitá, subject to all equities which would affect it in his hands, the question which presents itself for our consideration is whether there was, previously to the attachments relied upon, an equitable assignment by Rámji Joitá to Finlay, Scott, and Co. of the surplus proceeds of the one

(a) 4 Myl. & Cr. 408.

(b) 4 Sim. 70.

(c) 4 Sim. 316. See also *Alexander v. Crosby*, 1 Jo. & Lat. 670, 671, by Lord St. Leonards.

(d) 3 Jo. & Lat. 603.

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hundred bales, which assignment would have been valid as against himself? If there were such an assignment, there could have been no right, title, or interest of Rámji Joitá upon which the attachments could operate.

Now a good assignment of a chose in action may, in equity, be made even by parol (2 Spence, 856), and it has been argued by Mr. White that the facts disclosed in para. 21 of Mr. Reid's affidavit amount to such a parol assignment to Finlay, Scott, and Co. But we do not think it necessary to resort to para. 21 for an oral equitable assignment of the surplus proceeds. We think that the letter dated on the 18th July and signed by Rámji Joitá before the 8th of August, is a good equitable assignment in writing to Finlay, Scott, and Co. It closely resembles the letter which in *Diplock v. Hammond (c)* was held to be a valid equitable assignment. (See also *Chowne v. Baylis*, 31 Beav. 351.)

It has, however, been said that the moneys had not reached Ewart, Latham, and Co. on the 8th of August 1870, when they received the letter, and, therefore, that there was not any valid assignment. But this argument is not well founded. It rests upon a confusion of assignment with notice. It was not merely possible, but highly probable, that the surplus proceeds of the one hundred bales, realisable by means of the policy of insurance, would reach the hands of Ewart, Latham, and Co., through whose firm Rámji Joitá had consigned those one hundred bales to England. The Court of Chancery gives effect to assignments of every kind of future and contingent interests, and possibilities, in real and personal property, if made for valuable consideration (2 Spence, 852-865). This court also is a Court of Equity, and follows the same doctrine. Such assignments operate by way of agreement or contract, which a Court of Equity will enforce. Those surplus proceeds, therefore, though not attachable under the Civil Procedure Code by a prohibitory order to Ewart, Latham, and Co., before the moneys reached their hands, and though probably not the subject of suit against Ewart, Latham, and Co. until then, yet, being at least a pos-

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sible interest in Rámji Joitá, were assignable by him in equity. Such assignment, if good against him, will be so against his judgment-creditors laying on attachments subsequent to the assignment: In order to obtain a clear view of this case, it must be remembered that this is not a struggle between rival assignees, but is one between an assignee for valuable consideration and attaching creditors. It is true that the prior assignee in equity of a chose in action (a debt), not having given notice to the debtor from whom the debt is due, cannot claim against a subsequent assignee for valuable consideration who did give such notice (*f*); but the reason for this is that, if a contrary doctrine were allowed to prevail, it would enable the creditor or *cestui que trust* to commit a fraud, by leaving it in his power to assign his interest first to one and then to another person, and perhaps to a great many more, and then persons, to whom the creditor or *cestui que trust* might subsequently offer to assign for valuable consideration, would have no opportunity of ascertaining, by any communication with the debtor or trustee, whether or not there had been a prior assignment of the debt or interest on which they proposed to rely as a security for their money. When it is said that an assignee has not done everything to perfect the assignment until he has given notice to the trustee or debtor, that means to perfect it for certain purposes—for it is plainly complete as between the assignor and assignee, if no third person claiming under the assignor intervenes. This reason does not apply to the case of judgment-creditors, who obtain their decrees quite irrespectively of the property, the subject of the assignment. These propositions will be found to be borne out by the remarks of Lord Lyndhurst in *Foster v. Cockerell* (*g*), and of Lord Chancellor Sir Mazière Brady in *Molloy v. French* (*h*), and by *Fortescue v. Barnett* (*i*), *Hobson v. Bell* (*j*), and Spence 764, 765. And in accordance with these views it was decided in *Justice v. Wynne* (*k*) that, between volunteers, giving notice,

(*f*) *Dearle v. Hall*, 3 Russ. 1, and *Loveridge v. Cooper*, *ibid.* 30.

(*g*) 3 Cl. & F. 456, 475. (*h*) 13 Ir. Eq. R. 261.

(*i*) 3 Myl. & K. 36. (*j*) 2 Beav. 23.

(*k*) 12 Ir. Chan. Rep. 289, 299.

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to the debtor, of an assignment of the debt does not affect priorities. Lord Justice Blackburne there said : “ It would be a total perversion of the doctrine of this Court to allow want of notice of a prior title to be a ground of defence of a puisne title or incumbrance acquired without consideration. That doctrine is founded on, and limited to, the purpose of protecting purchasers, and never can be called in aid of the right of a party claiming under a voluntary instrument, which is the claim of the respondent here.” Now in this case the assignees of the chose in action (Finlay, Scott, and Co.) are such for valuable consideration, namely, a pre-existing debt of Rs. 23,000 due to them by the assignor, Rámji Joitá ; and the attaching creditors are not rival assignees for valuable consideration, or indeed assignees at all. They are in no better position, as regards Finlay, Scott, and Co., than Rámji Joitá himself would be.

This not being a case of rival assignees, we think that the fact that notice was given to Ewart, Latham, and Co. by Finlay, Scott, and Co., before the moneys reached the hands of the former, does not affect the case, and, therefore, that the cases which have been cited for the execution-creditors, and which were decided with reference to the time at which notice was given, are inapplicable here. As to *Buller v. Plunkett* (1), in which there were, by an officer in the army, two covenants to assign the proceeds of his commission to two different parties ; and in both cases those parties gave notice to the army agent before those proceeds reached his hands, which notices Vice-Chancellor Wood treated as null and inoperative, and, therefore, refused to give priority to the second covenantee, who had given the earlier notice, it is worthy of remark that he did not hesitate to give effect to the first covenant as a good equitable assignment, although no valid notice of it, in his opinion, had been given to the army agent. In *Webster v. Webster* (m), Lord Romilly, M. R., in giving preference to the equitable assignee over the attaching creditor, is reported as attributing some importance to the fact, that a proper notice of the assignment was given

(1) 1 John. & Hem. 441.

(m) 31 Bear. 393, 398.

to the garnishee before the second attachment. We think, however, that, so far as regards the claim of the equitable assignee, the result of that case as between him and the attaching creditor ought to, and most probably would, have been the same, whether or not the equitable assignee had given any notice. There was not any necessity for notice to the garnishee in order to make the equitable assignment binding on the assignor, and, therefore, binding on his attaching creditor. Indeed, Lord Romilly admits (page 397) that the attaching creditor could rightly attach only such moneys in the hands of the garnishee as the assignor himself could recover from the garnishee. Any equities, which were good as against Mr. Guy Webster, would have been so as against his attaching creditor.

Some arguments were sought to be drawn for the execution-creditors from what it was alleged would have been the position of Finlay, Scott, and Co., as equitable assignees who had given a premature notice, with respect to assignees in bankruptcy or insolvency. But as Rámji Joitá was neither a bankrupt nor insolvent, it is unnecessary to complicate this case with such considerations.

Counsel for the execution-creditors having declined to base any argument upon the Stat. 13 Eliz., c. 5, we need only say that the equitable assignment to Messrs. Finlay, Scott, and Co. does not appear to us to come within the range of that enactment.

On behalf of the plaintiffs and the other attaching creditors an objection for want of a stamp has been made to the letter, dated July 18th, 1870, of assignment to Finlay, Scott, and Co. We should feel bound to admit it in evidence now on payment for the proper stamp, and of the penalty, if of opinion that it requires a stamp. But we have not been satisfied, by the argument for the plaintiffs and other attaching creditors, that the letter does require a stamp. If it fell under any heading in the Stamp Act, XVIII. of 1869, Schedule 1, it would be under that of "Conveyance." In the glossarial section of the Act (Sec. III., cl. 11), Conveyance is

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defined to mean "any instrument" (with certain specified exceptions) "by which property is conveyed *inter vivos*," and "property" is defined (*ibid.*, cl. 26) as meaning "property being in British India." The property (which was a chose in action) the subject of this letter of assignment, was not in British India when that letter was signed by Rámji Joitá, and did not arrive until ten or eleven months afterwards. It is at least doubtful whether the definition of property given in the Act would include property not in British India at the time of the execution of the document, but which may subsequently be brought or sent to British India. The word "being" gives strength to that doubt. Whenever it is *in dubio*, whether the Legislature intended to impose a charge upon the subject in favour of the Crown, the benefit of the doubt must, as established by a legion of authorities, be given to the subject (n). Accordingly, we hold that this letter does not require a stamp.

The order of this court is that the cause shown against the summons must be allowed, and the summons discharged. The plaintiffs, who took it out, must pay to Ewart, Latham, and Co. their costs as between solicitor and client. The attachments in this and the other suits, in which the several attaching creditors have been served with notice of this application, must, so far as regards the sum of Rs. 5,149, the subject of it, in the hands of Ewart, Latham, and Co., be removed. Those gentlemen will thus be left in such a position as to enable them to pay over that sum to Messrs. Finlay, Scott, and Co., who have succeeded in their contention here, and to whom, therefore, we should have given their costs of opposing the summons, had not the plaintiffs been encouraged to make the application by the fact, that one of the Judges of the High Court had in a similar case adopted a view favourable to them, and different from that on which we now act. Messrs. Finlay, Scott, and Co. will, accordingly, bear their own costs, as will also the several attaching creditors who have had notice to attend on the hearing of the summons.

(n) Vide *infra*, *Dullabh Shivrál v. Hope*, A. C. J. 213.

*S. L. R. 2 Bom. 134**Suit No. 233 of 1871.*1871.
Aug. 28.

RATANJI HORMASJI BOTTLEWALLA *Plaintiff.*
 EDALJI HORMASJI BOTTLEWALLA *Defendant.*

Injunction—Mandatory Injunction—Easement—Light and Air—Obstruction of Light and Air—Door, Light admitted by.

Where two houses are held jointly by several owners deriving their title from a common source, and one of such houses enjoys a continuous, as distinguished from an occasional, easement over the other, such easement will, upon a partition of the premises, pass to the dominant tenement, both by implication of law, and under the usual general words contained in the deed of partition.

When the Court is asked to interfere by injunction to restrain the obstruction of light and air to a dominant tenement, the question to be determined is—is the obstruction such as seriously to interfere with the comfort or enjoyment of the owners of the dominant tenement, or such as to cause a material injury to it—an injury which cannot be completely compensated by damages.

English cases on the subject reviewed.

The Court will in such cases interfere, as well by mandatory as by preventive injunction, provided that in the circumstances of the case there is nothing inequitable in putting in force the former remedy.

The Court will look not merely to the use to which rooms, in a dwelling-house from which light is obstructed, are actually put at the time of the obstruction, but also to the use to which they may be put for all reasonable purposes of occupation.

It is immaterial whether light is admitted through a window or a door. In case of obstruction, the owner of the dominant tenement is in either case entitled to protection.

THIS was a suit brought by the plaintiff to obtain an injunction to restrain the defendant from continuing the erection of a building in a courtyard of the defendant between the respective houses of the plaintiff and the defendant, and to compel the defendant to remove the building already erected by him therein.

The circumstances of the case generally, the relative positions of the houses of the plaintiff and the defendant, and the nature of the new building complained of are described in the judgment of the court.

On the 27th of February 1871 a very small portion of the building complained of had been erected, and a notice was then served by the plaintiff upon the defendant, requiring

1871. him at once to desist from further proceeding with the building. The plaint was filed upon the 27th of March, when an injunction was obtained until the hearing.

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The cause came on for hearing before SARGENT, J., on the 28th of August 1871, and was heard on that and several subsequent days. The following issues were raised :—

1st—Whether the obstruction of light and air in the plaint complained of is one which diminishes the suitability of the plaintiff's premises for the purpose for which they were used at the time when the obstruction was erected.

2nd—Whether the said obstruction will materially diminish the value of the plaintiff's premises.

3rd—Whether the plaintiff has been entitled to uninterrupted passage and access of light and air over the courtyard mentioned in the plaint, to any portion of the plaintiff's premises, for the twenty years previous to the filing of the suit.

4th—Whether the access and passage of light and air as claimed by the plaintiff are necessary and requisite to the premises of the plaintiff, according to the dispositions contained in the will of the testator in the plaint and written statement named ?

5th—Whether, according to the true construction of the deed of partition in the pleadings mentioned or otherwise, the plaintiff is entitled to the said passage and access of light and air as grantee thereof, constructively or otherwise.

6th—Whether the said obstruction ought to be taken as amounting to a nuisance prejudicial or dangerous to health or life.

7th—Whether the plaintiff is entitled to a mandatory injunction.

8th—Whether the plaintiff is entitled to any, and what, damages for the alleged injury done to his premises.

9th—Whether the defendant is entitled to any, and what, damages for the injury arising from the injunction of 27th March 1871.

Anstey and Lang, for the plaintiff:—The deed of partition between the parties (dated the 30th of May 1869), and the general words contained in it, establish the plaintiff's title to the easement we claim, as an easement by grant, either express or implied: *Watts v. Kelson* (a), *Pyer v. Carter* (b), *Suffield v. Brown* (c). We also contend that the windows are ancient lights. The alteration of the premises does not affect our right to have the new windows in the position of the old windows unobstructed: *Latham on Window Lights*, p. 130; *Tapling v. Jones* (d). The nature of the obstruction in this case is such as the court will interfere to restrain: *Yates v. Jack* (e); *Latham on Window Lights*, p. 76; and by mandatory injunction: *Dent v. Auction Mart Company* (f), *Martin v. Headon* (g), *Stokes v. City Offices Company* (h), *Gale v. Abbott* (i).

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The Honorable A. R. Scoble (Acting Advocate General) and *Latham*, for the defendant, contended that this was not a case for a mandatory injunction, but for temperate damages, which would be a sufficient compensation to the plaintiff. They cited *Isenberg v. East India House Company* (j), *Curriers' Company v. Corbett* (k), *Durell v. Pritchard* (l), *Jacomb v. Knight* (m). This is not even a case for a preventive injunction, as the damage suffered is not of a substantial nature: *Robson v. Whittingham* (n), *Buck v. Stacey* (o), *Jackson v. Duke of Newcastle* (p). The rooms of the defendant said to be darkened were, at the time of the obstruction, used as mere lumber-rooms, and are still for that purpose sufficiently lighted: *Martin v. Goble* (q), *Garritt v. Sharp* (r). They also cited *Lanfranchi v. Mackenzie* (s), and *Staight v. Burn* (t).

Cur. adv. vult.

- (a) Law Rep. 6, Ch. App. 166. (b) 1 H. & N. 916.
(c) 33 L. J. Ch. 249. (d) 12 C. B., N. S., 826; 11 Ho. Lo. 290.
(e) Law Rep. 1, Ch. App. 295.
(f) Law Rep. 2, Eq. 238. (g) Law Rep. 2, Eq. 425.
(h) 11 Jur., N. S., 560. (i) 8 *Ibid.* 987.
(j) 33 Law J. Ch. 392. (k) 2 Dr. & Sm. 355.
(l) Law Rep. 1, Ch. App. 244. (m) 32 L. J. Ch. 601.
(n) Law Rep. 1, Ch. App. 442. (o) 2 Car. & P. 465.
(p) 33 L. J. Ch. 698.
(q) 1 Camp. 320. (r) 3 Ad. & E. 325. (s) L. R. 4, Eq. 421.
(t) L. R. 5, Ch. App. 163.

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SARGENT, J.:—The plaintiff in this suit asks for the removal of a building newly erected by the defendant, and which, he says, will be an encroachment upon the plaintiff's ways of egress and ingress from and to the plaintiff's premises, will obstruct the hitherto uninterrupted access and passage of light and air for more than the last twenty years, over a certain courtyard, to the plaintiff's premises, and will render the plaintiff's house uninhabitable, and greatly deteriorate its value.

The defendant filed a written statement denying that the building in question would have the effect attributed to it by the plaintiff, and submitting that if the plaintiff's premises have received any appreciable injury by the new building; such injury will be amply compensated by moderate damages.

On the 27th of March 1871 an injunction was obtained until the hearing, restraining the defendant from further proceeding with the building, upon the terms of the plaintiff submitting to obey any order the court might make as to loss or damage that might be caused to the defendant by making such order.

At the hearing the plaintiff abandoned his objection to the building on the ground of its interrupting his right of egress and ingress to his premises, and the following issues were raised. [His Lordship read the issues and proceeded.]

The parties to this suit are two of the five sons of one Hormasji Pestanji Bottlewalla, who died in 1865, having made his will and thereby devised all his immoveable estate to his five sons.

About a year after the testator's death the brothers would appear to have proceeded to a division of the property, which was considerable, and to have taken possession of their respective portions, but the deed which effected a formal partition between the sons was not executed until the 30th of May 1869.

By that document the five sons conveyed the hereditaments and premises set out in the 2nd and 3rd schedules thereto,

J.L.R. 2 Bom. f. 137.

together with all the rights, easements, and appurtenances to or with the same thereby granted, or any, or any part of any of them, now or at any time belonging, or reputed to belong, or enjoyed, unto Jamsedji Hormasji and his heirs, as to so much of the same hereditaments thereby granted, with their appurtenances, as were in the 8th schedule thereto specified, to the use of the plaintiff, his heirs and assigns. The premises specified in the 8th schedule, and so conveyed to the plaintiff, are, it is admitted, or at least it is not denied, the premises now occupied by the plaintiff or his tenant. The premises so conveyed to the plaintiff consisted of two dwelling-houses looking on to a small courtyard, the other three sides of which were occupied by the property which fell to the lot of the defendant. The most southern of the two houses had been built by the testator, about two years before his death, in the place of one which he had purchased and pulled down. There is no evidence to show that there were ancient lights in the house so pulled down, or that the apertures in the new house occupied the place of such lights (if any) as there were in the old house; and there is, therefore, no case established here of the existence of ancient windows before the house came into the possession of the testator. It is, however, not denied that during the testator's life, and up to the date of the deed, the two dwelling-houses which were conveyed to the plaintiff enjoyed uninterrupted light and air across the defendant's premises through the apertures which existed in the side of the houses looking towards the courtyard.

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That being so, it is clear, upon the authority of *Watts v. Kelson* (u), decided by the Lords Justices, that the easement, being of a continuous nature, passed both by implication of law and by the general words of the conveyance. Their Lordships in that case distinguished such an easement from rights of way which are only used from time to time, and which were the matters in dispute in *Thomson v. Waterlow* (v) and *Langley v. Hammond* (w).

(u) Law Rep. 6, Ch. App. 166. (v) Law Rep. 6, Eq. 36.

(w) Law Rep. 3, Ex. 161.

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Now the Court of Chancery in England has, in the course of the last seven or eight years, had frequently to consider the question of obstruction to light and air; and the principles upon which the court will interfere by injunction either to prevent, or prohibit the continuance of, the alleged obstruction. The perusal of those cases beyond question leads to one conclusion—a conclusion referred to by the present Lord Chancellor, when sitting as Vice-Chancellor Page Wood, in the case of *Dent v. Auction Mart Co.* (x), namely, “That there are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained, or an action upon the case, which, however, might be maintained in many cases which would not support an injunction.” When, however, we pass to the application of that proposition to the varying circumstances of alleged obstructions, we find that the learned Judges, be they Vice-Chancellors or Chancellors, have differed materially both in their mode of stating the principles upon which that doctrine is to be applied, and still more, perhaps, in the application of the doctrine to the actual circumstances before them.

Now the earliest of the recent cases in which the matter has been fully considered is that of *Jackson v. The Duke of Newcastle* (y), before Lord Westbury. His Lordship, after referring to the judgment of Lord Eldon in *The Attorney General v. Nichol* (z), says: “The foundation of the jurisdiction appears to be, that injury to property which renders it in a material degree, unsuitable for the purposes to which it, is now applied, or lessens considerably the enjoyment which the owner now has of it. The court considers that injury of this nature does not admit of being measured and redressed by damages.” In *Johnson v. Wyatt* (a) before the Lords Justices, the Lord Justice Turner says: “I think that at all events a plaintiff coming to this court for its interference in a case of this nature is bound to show that the obstruction is such as will render the house occupied by him, if not of

(x) Law Rep. 2, Eq. 238.

(y) 33 L. J. Ch. 698. (z) 16 Ves. 342. (a) 33 L. J. Ch. 394.

less value, less fit, or at least substantially less comfortable, for the purposes of occupation.”

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In *Dent v. Auction Mart Co.* (b) the present Lord Chancellor, then V. C. Wood, having, as he says, considered the question in every possible way, arrived at the conclusion that when substantial damages would be given at law, as distinguished from some small sum—£5, £10, or £15—the court would interpose by injunction. However, he admits that he feels some difficulty with reference to recent authorities, and that the decision of the Lords Justices in *Robson v. Whittingham* is scarcely reconcileable with such a principle.

In *Martin v. Headon* (c), V. C. Kindersley says that whenever it is shown that the comfort or enjoyment of a man of his family in the occupation of his house is seriously interfered with, there is sufficient ground for the interference of the court; and lastly, in *Staight v. Burn* (d), Lord Justice Giffard says: “I take the course of this court to be, that when there is a material injury to that which is a clear legal right, and it appears that damages, from the nature of the case, would not be a complete compensation, this court will interfere by injunction.”

The statements of the learned Judges in the two last cases taken together seem to me to be as lucid and complete an exposition of the principle on which the court interferes in cases of this nature as the subject admits of.

It is to be remarked that in both those cases the learned Judges said they would have granted a mandatory injunction, had it been asked for in the first case, and had the question been before the court at the hearing in the latter.

In *Dent v. Auction Mart Co.* an injunction both preventive and mandatory was granted; and in *Johnson v. Wyatt* the question before the court involved the right to an injunction of either description. It is clear, I think, therefore, that the learned Judges had the remedy by mandatory injunction in contemplation when they laid down the principle upon which

(b) Law Rep. 2, Eq. 238.

(c) Law Rep. 2, Eq. 425.

(d) Law Rep. 5, Ch. App. 163.

1871. **BATANJI H. BOTTLEWALLA** v. **EDALJI H. BOTTLEWALLA.** the court interferes. This is clearly so with respect to Lord Westbury, from his Lordship's remarks in *Isenberg v. East India House Estate Company*. He says: "The remedy given by the Common Law for a grievance of this description is an action for damages—that action is liable to be resorted to so long as the cause of damage continues. Upon that ground, and by reason also of the damage in many cases not admitting of being estimated in money, this court has assumed jurisdiction. Now this jurisdiction, so far as it partakes of the nature of a preventive remedy—that is, prohibition of further damage, or an intended damage—is a jurisdiction that may be exercised without difficulty, and rests upon the clearest principles. But there has been superadded to that the power of the Court to grant what has been denominated a 'mandatory injunction,' that is, an order compelling a defendant to restore things to the condition in which they were at the time when the plaintiff's complaint was made. The exercise of that power is one that must be attended with the greatest possible caution. I think, without intending to lay down any rule, that it is confined to cases where the injury done to the plaintiff cannot be estimated and sufficiently compensated by a pecuniary sum"—that is, according to his Lordship's remarks in *Jackson v. Duke of Newcastle*, "when the interference with the light and air renders it in a material degree unsuitable for the purposes to which it is applied."

In *Durell v. Pritchard* (e) Lord Justice Turner says: "The authorities upon this subject lead, I think, to these conclusions, that every case of this nature must depend upon its own circumstances, and that this Court will not interfere by way of mandatory injunction, except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld." The language used by Lord Westbury and Lord Justice Turner is undoubtedly somewhat stronger than that employed by the learned Judges in the more recent decisions, in 1866, of *Dent v. Auction Mart Co.*, *Martin v. Headon*, and *Staight v. Burn*, and shows doubtless that the tendency of the decisions is towards a less

(e) Law Rep. 1, Ch. App. 244.

sparing exercise of the jurisdiction than formerly prevailed, and that too on the ground that the interference with light and air is not merely a nuisance, but an interference with that which, as V. C. Kindersley says in *Martin v. Headon*, is, as a matter of principle, just as much part of the property of a man as his land or his house, and just as much entitled to protection as any other property.

Now the circumstances of the present case are these.

The premises belonging to the parties to this suit are, as has been stated, built round an inner courtyard, the west side being occupied by those of the plaintiff, and the other three sides by those of the defendant.

This yard is about twenty-one feet wide on the south side and twenty on the north, and covers, exclusively of a small recess in the defendant's premises, about 295 square feet. And the surrounding wall on the north, east, and south sides was about forty-five feet high. The obstruction in question is a building on the south side of the court, joining the defendant's premises on that and the east side of the court, and continued up to the top of the defendant's wall, but with a roof sloping inwards to towards the courtyard. It projects six feet, exclusive of the eaves of the roof, from the defendant's wall, against which it is built, and is carried westward till its outer wall is within eight feet of the plaintiff's wall. It is said by the plaintiff's surveyor and architect to cover a hundred square feet. But it is clear, I think, from simple calculation, that this can scarcely be the case, and that 82 sq. ft. 10 in., as stated by the defendant's surveyor, is nearer the truth. In any case it occupies between a fourth and one third of the entire yard. Now the plaintiff's premises consist of two houses communicating by a common exterior verandah on the side of the courtyard on the first and second floors. On each verandah there are two doors leading into the two houses ; and the new building projects as far as the northern side of the door on either verandah nearest to the south-west corner of the court. The southernmost of these houses was, as I have stated, rebuilt by the plaintiff's father before his death, and I shall, therefore, for

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RATANJI H. other as the old house.
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Now, so far as light is concerned, I do not think it was contended that the old house was materially affected, although some amount of lateral light must doubtless be intercepted. As to the new house, the same remark applies to the third and fourth stories both as to light and air, independently of the question, which I omit for the present, as to the particular use to which the new building is intended to be put by the defendant. This was not, I think, attempted to be denied by the plaintiff's own witnesses, and I was enabled, by inspection of the premises, to ascertain that this was the case beyond all doubt.

I now pass to the second story of the new house.

The light and air are here admitted by keeping the door open which leads into the exterior verandah. It was contended that this was not a window. But I conceive that the only question is whether there is an aperture capable of admitting light and air, and that such aperture will confer the same legal right, whether it be used exclusively for the passage of light and air and termed a window, or intended to be used as a means of communication and called a door. This is more particularly the case in this country, where, perhaps, except during the monsoon, a door and a window are almost the same, so far as the admission of light and air is concerned. There is a roof to the verandah extending to within three feet of the defendant's new building. The effect of this is to intercept the direct sky-light, so that, according to Mr. Assheton, the plaintiff's architect, it only entered about three feet into the room. This light is now entirely intercepted by the new building.

It was contended by the defendant that, as the plaintiff has diminished his light and air by his own act, the question of material diminution of comfort must be determined with regard to that diminished light. It appears, however, that the roof—although, according to the evidence of the carpenter, Jamsedji Fardunji, it was built by the orders of the plaintiff himself—is not of a permanent character. This is admitted

by Mr. Morris, the defendant's architect, who saw it in April, and says it had no covering then, and that it now has plates of corrugated iron, and is not of a permanent character. It is plain, then, that the plaintiff has put a covering to the wooden rafters which can be placed or removed according to circumstances, and has certainly done nothing which can be deemed equivalent to a surrender of his right, or disentitle him to the same amount of light and air as he enjoyed when he first took possession of the property. The remarks of V. C. Wood in *Dent v. Auction Mart Co.* at page 251 are applicable to this case:—"They may wish to accommodate the light and air to the season of the year. That is no reason they should be deprived of it at all times."

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Now the direct sky-light, supposing the covering to be removed, must have penetrated into the room some eight feet, and now will penetrate only three and four inches. I take these figures from Mr. Assheton's diagram, but Mr. Morris's diagram would show quite as great a difference. In any case it is obvious it must be considerable. The same remark applies with still greater force to the first floor. Here the direct light only enters, Mr. Assheton says, two and a half feet, instead of nine feet.

Again, there will be a considerable loss of sky-light in azimuth, extending to 9° according to Mr. Morris. No doubt, the doors will still continue to receive light from the north and north-east; but that light, besides coming from the sunless side of the heavens, will fall principally in the corner of the rooms where the well and privies are, and not diffuse itself over the rooms.

It was said also that there will be reflected light from the wall of the new building when it is whitewashed. But, as was said by Lord Justice Giffard in *Staight v. Burn*, they are not bound to put up with reflected light, even if it would not be incomparably less than the direct sky-light; and again, as was said in *Dent v. Auction Mart Co.* with respect to glazed tiles, who is to ensure the wall being kept whitewashed, or in a state to reflect light? The plaintiff is entitled to stand on his right, and not to depend upon the degree of

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Dinshá, who is at present the occupant of the new house, says it is darkened to a great extent—the degree increasing as you descend. There is the usual difference of opinion amongst the professional witnesses; but as it is not on a matter peculiarly within their knowledge, I have paid but little regard to it. After a personal inspection of the premises, and examination of the diagrams of the surveyors on either side, I can come to no other conclusion than that there will be a considerable diminution of light on the first and second floors.

It is said, however, that this diminution of light will not seriously or materially affect the enjoyment of the house as a dwelling-house, having regard to the use which is made of the rooms, the quantity of light which still remains, the habits of the occupants, and what people can reasonably expect in a crowded city like Bombay.

The latter argument was undoubtedly adopted by Lord Cranworth in *Clarke v. Olark*. His Lordship's remarks in that case seem to amount to this—that if a man has as much light as falls to the lot of the inhabitants of towns generally, he cannot be said to suffer any material inconvenience. His Lordship would appear to have abandoned his own principle in *Yates v. Jack*; and in *Dent v. Auction Mart Co.* the present Lord Chancellor expressed his disapprobation of it, and that too quite independently of the effect of the English Prescription Act; and this view was adopted by V. C. Kindersley in *Martin v. Headdon*. Until the Legislature thinks proper to deal with the question, the only one which the court has to decide is whether the enjoyment has been seriously interfered with by the obstruction of the light and air.

With respect to the argument based on the present use made of the rooms, the right to light and air which was appurtenant to the new house, and which was granted by the deed of conveyance, must be at least a right to such light and air as was necessary for the enjoyment of the rooms as part of a dwelling-house, and for such purposes

as they might reasonably be put to. That purpose will vary from time to time according to the exigencies of the family; but the mere circumstance that the room is used as a lumber-room or godown at the present time cannot, I conceive, affect the question of enjoyment, which is the right to its enjoyment for all reasonable purposes to which it may be put as a room in a dwelling-house; and we have not here the difficulty which seems to have presented itself to Lord Westbury in *Jackson v. Duke of Newcastle*, namely, whether the court could take into consideration the possibility of the room being used for some special purpose requiring an extraordinary amount of light.

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With respect to the room on the first floor, it would appear to have been used as a godown for storing grain and the necessaries of life. The defendant says it was so used in his father's lifetime, and Dinshá says he has always used it for that purpose; but there is nothing to prevent its being used for a bedroom; and if the house were let in floors such would probably be the use made of it. The first floor, Dinshá says, he has always used as a sitting-room; and that is not denied by the defendant, although the defendant says he used it as a lumber-room when he lived on the second floor. In any case it could clearly be used for such a purpose.

With respect to the light which enters the rooms independently of that admitted by the doors, the rooms are dependent on two windows looking into an inner court or rather well of about a yard wide and three or four yards long, continued up to the roof and having a sky-light on it, and also on such light as they receive from the windows looking into Bohrá Bazár Street. The light from both these sources is necessarily very small. Indeed, the light could never have been more than was positively necessary for the ordinary purposes of life.

I have hitherto considered the question with reference to light; but the plaintiff was equally entitled to the free passage of air through the door, and also the apertures on

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the groundfloor of the new house. There must always have been an imperfect circulation of air in so confined a court. But it is impossible that the filling up nearly one-third of it by a building reaching to the top of the surrounding walls, and placed only eight feet from the plaintiff's house, should not greatly diminish the air entering the house, and sensibly affect the proper ventilation of it. This is still more so from the circumstance of the building being on the south side, from which the air comes during the hottest season of the year. Dinshá, who occupies the new house, says the air from the privies in his house cannot escape, owing to the new building. It is further to be remarked that the new building will tend to create a stagnation of air in the corner formed by it, the plaintiff's house, and the portion of the defendant's house, where all his privies are opening into the courtyard. The purpose to which the defendant is going to put the new building may not be in itself a nuisance; but I cannot but think, as the Lord Chancellor held in *Dent v. Auction Mart Co.*, under somewhat similar circumstances, that the creation of this confined space, with kitchens and privies on two sides of it, in the vicinity of the doors leading into the plaintiff's house, is an interference with air, which the court will recognise as a nuisance.

Under all these circumstances I should have little or no difficulty in concluding that the defendant's new building will seriously diminish the enjoyment of the new house. But the case does not rest there. By the deed of partition the defendant expressly covenanted with the plaintiff, as far as his own acts were concerned, that the hereditaments and premises thereby conveyed to the plaintiff should at all times thereafter be peaceably and quietly held and enjoyed without any interruption or disturbance whatsoever from or by the defendant.

The building in question is beyond all doubt an interruption of the plaintiff's enjoyment of the right to light and air, which, either expressly or by implication of law, was part of the hereditaments and premises granted to the plaintiff by the above deed; and the court will, in the absence of special

circumstances, compel the defendant to perform his covenant without looking minutely into the nature or extent of the interference. The circumstances here are precisely the same as those in *Davies v. Marshall* (l), where the remarks of V. C. Kindersley at page 562 are strictly applicable to the present case. "The defendant is materially obstructing the light and air which the plaintiff was entitled to, and the court will not go into the question whether or no it seriously affects his enjoyment of the house." So again, in *Low v. Innes* (m), the simple question was whether the covenant had been violated by the defendant, and the mandatory injunction was refused only because the defendant made such an offer as would put the plaintiff in as favourable, if not more favourable, a position than if the defendant had acted up to his undertaking. As to special circumstances that would render the interference of the court inequitable, I can discover none. There was an attempt at arbitration, at which no conclusion was come to according to Sorábji, who acted as arbitrator for the plaintiff. The defendant and Jamsedji, his arbitrator, say the plaintiff agreed to the building being erected in its present position two feet further from his house than was originally intended. Jamsedji's evidence is quite untrustworthy—is contradicted by the evidence of the independent witness, the *mestri*, who says the foundations were never changed; and the defendant, by the reckless manner in which he swore as to the state of the building in his affidavit (exhibit S), is certainly not a reliable witness.

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The plaintiff and Sorábji are corroborated in their evidence by the course the plaintiff took only a few days afterwards, when the foundations were commenced. A notice was at once served on the defendant, warning him against proceeding with the building; and Sorábji says that a further attempt was made to persuade the defendant to buy the plaintiff out before the bill was filed, which was delayed, as Mr. Jefferson says, by his advice, in the hopes that the parties might come to terms.

(l) 1 Dr. & Sm. 557.

(m) 10 Jur., N. S., 1037.

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 RATANJI H. in *Jacomb v. Knight* (n), all objections to the mandatory
 BOTTLEWALLA form of the injunction—by which I understand the learned
 v. Judge to mean, deprives the defendant of all right to com-
 EDALJI H. plain of its particular form.
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I, therefore, find the fourth, fifth, sixth, seventh, and ninth issues for the plaintiff, and order that an injunction issue, restraining the defendant from allowing the building in question to remain. The defendant to pay the costs of the suit.

Attorneys for the plaintiff: *Jefferson and Payne.*

Attorneys for the defendant: *Keir, Prescott, and Winter.*



Suit No. 194 of 1870.

Dec. 4.

PURSHOTAM SHA'MA' SHENVI *Plaintiff.*
 VA'SUDEV KRISHNA' SHENVI *Defendant.*

Adoption—Adopted Son—Purchaser for Value—Right of Father to will away self-acquired Property from Adopted Son.

An adopted son does not stand in a better position, with regard to the self-acquired immovable property of his adoptive father, than a natural-born son would occupy; and there is nothing in the Hindú law in this Presidency to prevent a father from disposing by will of his self-acquired immovable property, and so defeating the rights by inheritance of his adopted son.

THE plaintiff in this suit alleged that one Shámá Shivrám Shenvi died, on the 6th of October 1869, possessed of considerable property both moveable and immovable; that in the year 1848 the deceased and his wife, Sakhubái, had adopted the plaintiff as their son; that Sakhubái died in 1863 intestate, leaving the plaintiff her only son and personal representative; that the deceased and Sakhubái his wife had performed the *munj* and *lagna* ceremonies of the plaintiff, and had always treated him as their son; and that the defendant had, upon the death of Shámá Shivrám Shenvi, possessed himself of all Shámá's property, immovable as

well as moveable, and refused to give it up to the plaintiff. The suit was brought to recover such property from the defendant.

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The plaintiff also claimed to recover from the defendant the *stridhan* of his adoptive mother, Sakhubái, which, the plaintiff alleged, had come into the possession of the defendant.

Shámá died without natural-born male issue, and possessed of a house in Lohár Chál Street, and some moveable property of trifling value.

The defendant relied upon a will of the deceased, dated the 18th of August 1869, whereby Shámá, after reciting that he had adopted the plaintiff as his son, and had expended much money upon his education and upon the purchase of jewels for his wives, and that the plaintiff had not behaved in a becoming manner towards him, devised his house in Lohár Chál Street to the defendant, bequeathed his moveable property to the plaintiff, and appointed the defendant executor of his will. The defendant set out a list of the moveable property of Shámá which had come to his hands, and which before suit he offered to hand over to the plaintiff. He denied that he was in possession of any *stridhan* left by Sakhubái. The execution of the will by Shámá was not disputed, and it was admitted that the property left by him was his self-acquired property. The case was heard by SARGENT, J., on the 10th and 11th of November 1871.

The only issue raised which is material for the purpose of the present report was the first—

“Whether Shámá Shivrám Shenvi could make a will, after the adoption of the plaintiff, so as to pass his self-acquired immoveable property away from the plaintiff, and so to defeat the plaintiff's rights of inheritance.”

Atkinson, Serjeant, and Bál Mangesh Wágle, for the plaintiff, contended that after adoption a father has no power to disinherit his adopted son: Morley's Digest, Inheritance, Vol. I., p. 308, Sec. 27; Strange's H. L., Addenda xliii. (Madras ed.); Morley's Digest, Vol. II., p. 133; Strange,

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p. 330, Addendum to 4th Madras edn. An adopted son is a purchaser for valuable consideration. The agreement implied in such a case is in the nature of an ante-nuptial settlement. No father would give his son in adoption unless the adopted son were entitled to succeed as of right to his adoptive father.

The Honorable A. R. Scoble and Latham, for the defendant:—The idea of an adopted son being a purchaser for value is repugnant to all Hindú notions. The effect would be to deprive the adoptive father of all power of dealing with his own property. An adopted son may be in a worse, but certainly is not in a better, position than a natural son, and a father's right to dispose of his self-acquired property, whether moveable or immoveable, has long been established as law in this Presidency. The point now raised was assumed, if not decided, in favour of the defendant by a Full Bench at Calcutta in the case of *Sudanund Mohapatha v. Bonomallee (a)*.

Cur. adv. vult.

4th December 1871. SARGENT, J.:—This was a suit brought by an adopted son seeking to set aside a will made by his father by adoption, and to have it declared that the devise of his immoveable property therein contained was void, and praying that the defendant, who was the executor appointed by the will, might be decreed to make over to the plaintiff the property left by his father. There was also a claim for the *stridhan* left by the wife of the testator, but that question was abandoned at the hearing, and the only remaining matter for consideration resolves itself into this, whether the testator was competent to make a will of self-acquired moveable and immoveable property so as to defeat the rights of the plaintiff, his adopted son. The matter seems to have been treated as clear by the High Court of Bengal. The question arose in a case of *Sudanund Mohapatha v. Bonomallee (ubi supra)*, where the point at issue was as to the validity of the adoption of a second son after a son's adoption. It was, however, treated by the court in that case as

(a) Marshall's Calc. Rep. 317.

plain, that a father could dispose of his self-acquired and personal property so as to defeat the claim of his adopted son. That case came before a Full Court, and the point was again treated as being beyond all doubt. Indeed it would appear not even to have been argued. When we pass to the Hindú authorities, there can be no doubt upon the subject. An adopted son is in the same position as a son born, at least unless a son be subsequently born. Sir Thomas Strange, at page 97 of his work, after citing a passage from Jagannáth, says:—"Adoption being a substitution for a son begotten, its effect is by transferring the adopted from his own family to constitute him son to the adopter with a consequent exchange of rights and duties," and that is fully borne out by all the authorities cited by the author. In *Narasammal v. Balarama Charlu* (b) Holloway, J., lays down the same proposition.

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The argument by which it was contended that an adopted son must be considered to be a purchaser for valuable consideration is opposed to all the authorities on the subject of adoption. They all treat it as the case of a gift of the son by the natural father, which is assented to and received by the adopter, and there is not a trace of any restriction on the adopter's power of alienation more extensive than in the case of a natural son.

It is clear, therefore, as the property was admittedly self-acquired, that the plaintiff has no claim to the house in Lohár Chál Street. The plaint must be dismissed, and, as I see no grounds for saying that the costs should come out of the estate, dismissed with costs.

Decree for the defendant with costs.

Attorney for the plaintiff: *Shámráv Pándurang.*

Attorneys for the defendant: *Jefferson and Payne.*

(b) 1 Mad. H. C. Rep. 420-425.

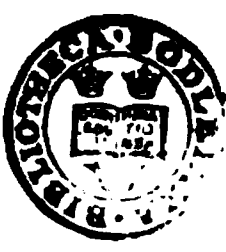
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Suit No. 548 of 1871.

THE LONDON, BOMBAY, AND MEDITERRANEAN
BANK, LIMITED *Plaintiffs.*
HORMASJI PESTANJI FRA'MJI *Defendant.*

*Foreign Judgment—Notice—Finality—Call-Order—Balance-Order—
English Companies' Act, 1862.*

The Courts in India treat a call-order made by the Court of Chancery in England upon a contributory of a company registered in England, and being wound up under the authority of the Court of Chancery, as a foreign judgment, and will not allow the liability of a defendant sued upon such order to be disputed, unless it be shown that the Court had no jurisdiction to make the order, or that the defendant had no notice of it, or that it is not in its nature a final order.



THIS was a suit brought by the Liquidators of the London, Bombay, and Mediterranean Bank to enforce against the defendant an order of the High Court of Chancery in England, of the 26th of January 1871. The order recited that it was made upon the application of the Liquidators of the bank, and upon hearing the solicitors for J. R., one of the contributories of the bank, *and no person appearing on behalf of the several other contributories named in the schedule to the order*, and directed the several persons named in the schedule (being contributories of the bank), on or before the 5th of July 1871, or within four days after the service of the order upon them, to pay to the Official Liquidators of the bank the sums set opposite their respective names in the schedule (being the amounts due from them in respect of a call of £10 per share made by an order of the 28th of July 1870), with interest on the amount of the said several sums from the 28th of October 1870 until payment.

The defendant's name was inserted in the schedule as a debtor to the bank in the sum of £525.

The London, Bombay, and Mediterranean Bank (Limited) was a joint stock company registered under the English Companies' Act of 1862, and had an office in London and a branch office in Bombay. On the 20th of July 1866 an

order was made in the Court of Chancery for the winding up of the company by the Court. The defendant's name was placed on the list of contributories on the 25th of April 1868. The defendant and several other Bombay shareholders had formed a committee in Bombay, who appointed solicitors in London to appear for them and endeavour to prevent the names of the Bombay shareholders from being placed upon the list of contributories. The committee was, however, unsuccessful, and the names of the Bombay shareholders were placed upon the lists. On the 28th of July 1870 an order for a call of £10 per share was made by the Court of Chancery upon the contributories of the Company. The order RECITED that it was made upon the application of the Official Liquidators, and after hearing the solicitors for certain shareholders named in the order, and Messrs. S., M., & E., solicitors for A'darji Kavasji and the other contributories of the said bank for whom they had entered appearance, as set forth in a schedule annexed to the order, and none of the other contributories of the said bank appearing either in person or by their solicitors, although duly summoned (as appeared upon affidavit); AND DIRECTED that a certain order, dated the 25th of May 1869, should be discharged, and that, in lieu of the call thereby directed to be made upon the contributories, a call of £10 per share should be made upon all the contributories of the bank who had been settled upon the list of contributories, but that as against the amount of such call the Official Liquidators should give credit for any sum or sums of money paid by any contributory, either under the order of the 25th of May 1869 or otherwise, in respect of each share in the bank held by him; AND IT WAS FURTHER ORDERED that each of the contributories of the Bank should, on or before the 24th of October 1870, or within four days of the service of the order upon them respectively, pay to the Official Liquidators of the bank the amount which should be found due from him in respect of the call.

The defendant not having paid the amount of the call on

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the day mentioned in the above call-order, the balance-order of the 26th of January 1871 was made, and upon the same day leave was granted by the Court of Chancery to the Liquidators to take proceedings against the persons mentioned in the schedule of the balance-order.

The plaintiff averred that a copy of the last-mentioned order had been served upon the defendant, but that he had not paid the amount therein mentioned, or any part thereof.

The plaintiff did not, however, aver that notice of the making of the balance-order had been served upon the defendant, nor did it appear from the proceedings that such notice had been given to him.

The defendant by his written statement alleged that he had been induced to apply for an allotment of shares in the London and Bombay Bank and General Financial and Insurance Agency Corporation (Limited) by a gross fraud on the part of the promoters and directors of that company; that endeavours had been made on behalf of the Bombay allottees of that company to have their names removed from the register, and steps (which were eventually abandoned) taken in the High Court with the same view; and that the London and Bombay Bank and General Financial and Insurance Agency (Limited) had been amalgamated with the Mediterranean Bank (Limited) without the knowledge or consent of the Bombay shareholders, and had thereupon changed its name to the name of the plaintiffs' company; and that the defendant had, therefore, never been a shareholder in the plaintiffs' company, and that his name, therefore, had been wrongly placed upon the list of the contributories of the plaintiffs' company; and that the call-order and balance-order were not, therefore, binding upon him, as he had never been a shareholder in the plaintiffs' company.

The cause was in the first instance set down as a short cause, but (the case being a representative one) was, by BAYLEY, J., adjourned for hearing before two Judges. It was, accordingly, heard, on the 7th of September 1871, before WESTROPP, C. J., and BAYLEY, J.

Green (with him *Macpherson*), for the plaintiffs, put in evidence certified copies of the several orders and documents upon which the plaintiffs relied :—(I.) the order to wind up the plaintiffs' company (20th July 1866); (II.) affidavit, dated the 8th of August 1868, showing that notices of the settling of the list of contributories had been duly served; (III.) certified copy of the list of contributories; (IV.) order of the appointment of the plaintiffs as Liquidators (27th July 1869); (V.) the call-order of the 28th of July 1870; (VI.) original balance-order of the 26th of January 1871, signed "H. F. CHURCH, Chief Clerk." The admission in evidence of this order was objected to by *Scoble*, on the ground that it ought to have been proved, as it did not come within the purview of the Indian Evidence Act (XV. of 1852). *Green* relied upon the 14th & 15th Vict., c. 99, ss. 11 and 19, Sec. 125 of the English Companies' Act, and Taylor on Evidence, Sec. 1400. (VII.) Order allowing the Liquidators to take proceedings against the defendant (26th January 1871). Personal service of the balance-order on the defendant on the 10th July 1871 was admitted. The plaint was filed on the 3rd of August 1871. *Green* stated that the suit was technically brought on the balance-order, which was in effect a foreign judgment, but that the suit was really upon both the balance and the call order, and asked for a decree for the amount claimed.

The Honorable A. R. Scoble (Acting Advocate General) (with him *Farran*, for the defendant):—As the courts in India are not subject or ancillary to the High Court of Chancery in England, this call cannot be enforced under the provisions of the English Companies' Act of 1862. The orders must, if relied upon, be treated as foreign judgments, and sued upon as such. It must, therefore, appear that they conform to the requirements of the Common Law. I admit that, as a general rule, in a suit to enforce a foreign judgment, the merits of the cause of action upon which that judgment is founded cannot be entered into: *Bank of Australasia v. Nias* (a); *Ellis v. M'Henry* (b); but though that is

(a) 16 Q. B. 717. (b) L. Rep. 6, C. P. 228.

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so, yet where the defendant has, as here, a *bonâ fide* defence upon the merits, the court will minutely examine the foreign judgment to ascertain whether the requirements of the Common Law have been complied with, and, if it finds that they have not been complied with, will compel the plaintiff to sue upon his original cause of action, and he will then be entitled to use the foreign judgment as evidence only. The cases show that a foreign judgment can be impeached on any of the four following grounds :—

- (I.) That the court passing it had no jurisdiction.
- (II.) That the defendant had no notice to appear and defend the suit.
- (III.) That the judgment has been obtained by fraud.
- (IV.) That the judgment is not a final judgment.

We cannot contend here that the judgment has been obtained by fraud, but as to the jurisdiction we say that, as the defendant is an inhabitant of Bombay, the only ground that gives the Court of Chancery jurisdiction over him is the fact that he has consented to become a member of an English company, but in the eye of the law he never has so consented, as his consent was brought about by fraud. He cited on the question of jurisdiction *Henderson v. Henderson* (c); Story's Conflict of Laws, pl. 529, 544–549. [WESTROPP, C.J., referred to *Vallee v. Dumergue* (d).] [BAYLEY, J., referred to *Barber v. Lamb* (e).] If the court had no jurisdiction, there is nothing on the face of the proceedings to show that the defendant attorned to it and so gave it jurisdiction: *Taylor v. Best* (f).

The plaintiffs must take their stand either upon the call-order or the balance-order. If they rely upon the former, I contend that it is not a final judgment, inasmuch as it contemplates something further being done, namely, the

(c) 6 Q. B. 288. (d) 4, Exch. 290. (e) 29 L. J., C. P. 234.
 (f) 23 L. J., C. P. 89.

making of a balance-order. It cannot, therefore, be enforced as a conclusive judgment: *Patrick v. Shedden* (g); *Carpenter v. Thornton* (h); *Henderson v. Henderson* (i); *Paul v. Roy* (j); *Bonaker v. Evans* (k); *Fry v. Malcolm* (l); *Lindley on Partnership*, p. 1393, (2nd edn.) As to the balance-order, it does not appear, nor is it alleged, that the defendant had notice of it, nor is it so recited in the order itself. If such notice has not been given, it would be contrary to natural justice to enforce the judgment here without giving the defendant an opportunity of showing that he has a defence upon the merits: *Buchanan v. Rucker* (m). He also cited *Scott v. Pilkington* (n).

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The defendant was then called and examined. He stated that he was not aware whether his solicitors had entered an appearance for him in the Court of Chancery at the time when the call-order was made, but that he was a member of a committee in Bombay which had instructed solicitors in London to oppose the making of the call. It also appeared that when he received notice of the call-order having been made, there was an indorsement upon the notice to the effect that in default of payment of the amount due from him the Liquidators would apply (on a day named) to the court for a balance-order against him.

Green was heard in reply.

WESTROFF, C. J. :—We have no doubt as to how this case should be disposed of. We think that there is no valid defence to the suit. The plaintiffs sue for Rs. 5,250, the equivalent for £ 525 due to them as the Liquidators of the London, Bombay, and Mediterranean Bank, which seems to have been composed of two existing companies which were amalgamated, and it may three years ago have been a question whether or not the defendant was a person who ought to be placed on the list of contributories of the London,

(g) 2 Ell. & B. 14. (h) 3 B. & Ald. 52. (i) 6 Q. B. 288.

(j) 15 Beav. 433. (k) 16 Q. B. 163. (l) 4 Taunt. 705.

(m) 1 Camp. 63. (n) 2 B. & S. 11.

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Bombay, and Mediterranean Bank when the order for winding up the bank was made. The bank was formed in London, subject to the provisions of the English Companies' Act. Its head office and local habitation, so far as a banking company can have a local habitation, must be deemed to have been in London, and it was liable to be wound up under that Act if its condition were such as to justify an order to that effect. Such an order was made, and the propriety of it has not been contested. The shareholders were liable to be placed on the list of contributories, and the Court of Chancery had undoubtedly the jurisdiction to decide whether or not a person should be placed on the list of contributories. The Court of Chancery on the 25th of April 1868 decided that the defendant, Hormasji Pestanji Framji, should be placed on the list of contributories for 75 shares. It now, from the admissions of the defendant, appears that, for the purpose of resisting being placed on that list, he and others with him instructed a gentleman, Mr. Dadabhai Nowroji, to employ, and who did employ, for them a solicitor in London, and the defendant says he believes that an appearance must have been entered on his behalf as a resisting shareholder. He, therefore, had his opportunity of contending that he ought not to be placed on the list, and he admits having had notice that the list of contributories was about to be settled, and that it was sought to place his name upon it. When the £10 call was made in July 1870, the order then made recited that certain contributories appeared by solicitors, and that the others, though duly summoned, did not appear. There is no evidence to show that the defendant had no notice of the application to make that call. He had at that time his solicitor in London, and in all probability that solicitor received a notice. At all events the burden lies upon the defendant to show that he did not. The order must be assumed to have been regularly made until the contrary be shown.

• It has, however, been said that the order of July 1870 was not a final order, and we are inclined to be of that opinion:

for it provides that certain credits should be given to the defendant in respect of such calls as he may have previously paid, and there is nothing on the face of that order to show what the amount of those calls was, and it would be open to him to make his claim for the reduction of the £10 call by the amount of those calls; but that question is not now material, for when he was served with a copy of that order by the Official Liquidator, which he admits was the case in October 1870, he also received a notice at foot of that copy, which notice was signed by the Official Liquidators, stating that the amount claimed was Rs. 5,250, and giving him full credit for the two sums for which alone he himself claims credit in his written statement; and in that notice it was stated that if he did not pay within a given time, application would be made to the Court of Chancery for a positive order for the payment of that sum. The time having elapsed, an order was applied for and made, and that is the one directing him to pay the money—Rs. 5,250—the balance, on the £10 call per share, left after deducting the two previous calls which he had paid. We think he has had ample notice of the application for that order, and we think also that the court had jurisdiction to make it. It is not alleged that there was any fraud in obtaining the orders of the Court of Chancery, and, whatever fraud, if any, there may have been used in inducing the defendant to join the company, such latter fraud might have been put forward as a defence in that Court—if it were a good defence under such circumstances as the defendant was placed in—when the application was made in 1868 to put his name on the list of contributories. This court cannot, in an action on the balance-order of January 1871, inquire into the propriety of the defendant's being placed on the list, or of the order of July 1870, or of the balance-order itself, if, as we are satisfied was the fact, the defendant had opportunities in the Court of Chancery of opposing those proceedings and of making his defence, and if, as we also think, that court had jurisdiction over him as a member of this English registered company.

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In the month of January 1857, the defendant Kávasji Nánábhái Dávar, and a number of other persons at his request, agreed to form a partnership for the purpose of establishing a factory for manufacturing cotton twist.

The partnership agreement ultimately entered into was embodied by Kávasji Nánábhái in a Gujaráti writing of the 10th of January 1857. The material portions of this writing were substantially these :—

“To Pársi Kávasji Nánábhái Dávar, written by the undersigned. You are establishing a factory for the manufacture of ‘water’ cotton twist. For the same there have been made 100 allotments—that is, 100 shares. Each share has been fixed at Rs. 3,000.”

The first clause of the agreement provided that ground for the factory was to be procured, a building erected, and machinery sent for from Europe, and proceeded thus :—“In regard thereto, whatever business may have to be transacted—that is, the employment of persons, and whatever outlays may have to be made for the factory—the whole management thereof we, the undersigned shareholders, having agreed, have intrusted to you. That management do you duly carry on during your lifetime, and the entire authority for signing, and carrying on the entire management of the factory, belongs to you.” After his decease the shareholders were to appoint an agent or trustee in General Meeting.

The second clause, by reference to the signatures at the foot of the agreement, showed the number of shares held by each partner, and provided for a deposit of Rs. 500 being paid in respect of each share, at the execution of this agreement, by each shareholder.

The third clause provided that whatever might be expended for a building and machinery, and other outlays, the shareholders should duly pay in equal portions according to their shares. “The ‘calls’ which you make in respect of the same, as there may be need, we are duly to pay within fifteen days’ time. If within the said time of fifteen days we should not pay the amount of each ‘call’ of those ‘calls’ which you may make, then the share or shares subscribed by us shall become ‘forfeited’—that is, there shall not remain, on the part of those who may not pay the ‘calls,’ any right to the deposit to the amount of Rs. 500 per share, and the ‘call’ or ‘calls’ which may have been (already) paid; and the money paid for the same shall be credited to the profit account of this company. And hereafter should any shareholder, of the shareholders who have signed below, sell or ‘make over’ his ‘share’ or ‘shares’ to any individual, the party or parties purchasing the same hereafter is or are also duly to act up to this agreement.”

The fourth clause was in the following words :—“All we shareholders have agreed to make this agreement or settlement, (namely) that, in return for the trouble you have been at in getting up this factory, we have appointed you for your life the agent or broker of this factory. As to that, it is to be understood as follows :—Whatever cotton may have to be purchased for this factory do you purchase, and whatever yarn may be made in this factory, all that do you sell. And for whatever you may sell

on account of the factory do you duly receive from this company your commission at the rate of Rs. 5 (namely, five) per cent. during your lifetime. But upon purchases you are not to receive anything from the company, yet on goods which you may purchase from merchants and sell, you yourself having received a percentage also agreeably to custom, do you duly give credit for the same to this company. Although we should not make the said purchases and sales through you, yet upon the whole amount of the sales we are duly to pay Rs. 5 (five) per cent. during your lifetime. And after this factory shall begin to work, an account, having been caused to be printed, shall be given to all the shareholders every six months: whatever profit may accrue do you duly allot therein."

The fifth clause provided that all the risk in respect of the company should be on the shareholders.

The sixth clause provided for the calling of meetings of shareholders by means of circulars, and further provided that no person whatever on the part of any shareholder or shareholders was to be allowed to join the said meetings.

The seventh clause provided for the resolutions of a majority of shareholders being binding on the minority, "the shareholders' votes being reckoned at one vote for each share."

The eighth clause provided that if any of the shareholders should sell his share, the purchaser should agree in writing to be bound by all the conditions of the writing.

The ninth and tenth clauses provided for a due observance of the conditions of the agreement, and were followed by the signatures of the original shareholders, thirty-five in number. Kávasji Nánábhái originally held 37 shares.

The partnership was not registered as a joint stock company. Act XLIII. of 1850 did not render registration compulsory, and Act XIX. of 1857 did not become law until the 10th of July 1857, *i.e.*, six months after the formation of the partnership.

In pursuance of the above partnership agreement, Kávasji Nánábhái obtained a piece of land at Tárdev, erected buildings upon it, and purchased and erected machinery for the purpose of carrying on the business of the copartnership. He from time to time made calls on the partners, and before the year 1860 had called up the whole of the original capital of Rs. 3,000 per share. In April 1860 he made an additional call of Rs. 1,000 per share, which was paid by the partners. The necessity for this call was occasioned, as Kávasji Nánábhái stated, by reason of the original capital of three lákhs proving insufficient for the original and current outlay of the

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partnership. The work of manufacturing cotton twist was stated by Kávasji Nánábhái, to have commenced about June 1860, and the business was thenceforward carried on in the name of the Throstle Mill Company.

A general meeting of the partners was called, apparently for the first time, on the 2nd or 3rd of August 1861. It was then found that the whole of the stipulated capital of Rs. 3,000 per share that had been called up, and the extra voluntary contribution of Rs. 1,000 per share, had been expended, and that in addition the company had incurred debts amounting to Rs. 1,44,888-15-10.

At that meeting directors were appointed, the accounts were directed to be audited, and it was determined that, after the accounts were audited, the debt due by the company should be paid off by increasing the capital, or in such other way as the shareholders at a general meeting should determine, and the meeting was adjourned for that purpose.

The adjourned meeting was held on the 22nd of September 1861, when the audited accounts were laid before the meeting. Considerable discussion took place as to the affairs of the company, and finally the directors were empowered to consult upon the best course to be adopted for the interest of the shareholders. The meeting was then adjourned until the 2nd of October.

Kávasji Nánábhái attended the meeting of the 2nd of October, with several other shareholders, who were chiefly his nominees and holders of shares really belonging to him, and which he had transferred to them in order to qualify them as voters on his behalf. The meeting was a divided one, but ultimately a resolution was adopted, by 27 votes against 20, "that steps should be taken to wind up the affairs of the company, and to take the accounts of Kávasji Nánábhái by proceedings in the Supreme Court, and that Mr. Keir be instructed to take those proceedings."

On the 1st of November 1861 Kávasji Nánábhái made a further call on the shareholders of Rs. 500 per share, and threatened them with forfeiture of their shares if the call were not paid on or before the 16th day of the same month.

A suit was filed on the 6th of November 1861 on the Equity Side of the late Supreme Court, in which Lálbhái Vallabh-
bhái and the other shareholders who wished to dissolve
the company were plaintiffs, and Kávasji Nánábhái and
the shareholders who desired the company to continue to
carry on business were defendants. The bill prayed for a
dissolution of the company, the appointment of a receiver, an
injunction prohibiting Kávasji Nánábhái from carrying on
the business of the company, and from enforcing the call of
Rs. 500 per share, an account of the partnership dealings,
and a sale of its assets. The bill contained charges of fraud
and dishonesty against Kávasji Nánábhái.

An injunction was granted on the 16th of November 1861
against enforcing the call of Rs. 500.

A subsequent motion to dissolve the injunction was made
on the 6th of December 1861, and refused. Subsequently
the cause was heard by Sir Matthew Sausse, C. J., and
COUCH, J., and on the 23rd of January 1863 a decree was
made which declared the Throstle Mill Company dissolved
from the date of the filing of the bill, and referred it to the
Master, to take an account of the management by Kávasji
Nánábhái of the affairs of the company from its commence-
ment down to its dissolution, and from its dissolution
down to the date when a receiver should be appointed;
declared Kávasji Nánábhái entitled to credit for all sums
bonâ fide expended by him for the benefit of the company,
and to a commission of 5 per cent. upon sales effected by
him. The Master was further ordered to sell the property
of the company, and out of the proceeds to pay the debt due
by the company, and it was directed that whatever surplus
should remain should be divided amongst the shareholders
of the company, in proportion to the number of their shares.
It was also ordered that the Master should appoint a receiver
to wind up the affairs of the company (Kávasji Nánábhái
being permitted to apply and to be appointed receiver).
The decree reserved the consideration of the claim, if any,
of Kávasji Nánábhái to commission upon the funds to be
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1871. the Master should have made his report, and it was further
 LA'LBHA'I ordered *that the Master should be at liberty to state any special*
 VALLABHBHA'I *circumstances connected with or touching the premises, and to*
et al. *make one or more separate report or reports, and the Court*
 v. *reserved the consideration of all further directions and of the*
 KA'VASJI *costs until after the Master should have made his report, and*
 NA'NA'BHA'I *gave general liberty to apply.*
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The decree was silent as to the charges of fraud made by the plaintiffs against the defendant Kávasji Nánábhái.

In giving judgment, the Court, however, said that it did not consider that these charges had been as yet proved, but that it could not say what might appear on taking the accounts before the Master. The decree was also silent, as to the right of Kávasji Nánábhái to compensation for being deprived of the management of the partnership, and of commission during his life on its sales. In giving judgment, the Court, referring to *Aspdin v. Austin*, *Dunn v. Sayles*, *Pilking-ton v. Scott* (which it distinguished from the two former cases), and *Rashleigh v. The South-Eastern Railway Co.* (a), expressed an opinion against his claim in this respect, but added that if the articles of agreement contained any implied contract by the copartners to carry on the business during Kávasji Nánábhái's lifetime, the Court thought that he "should be left to the remedy by an action for damages," and on this point referred to *Emmens v. Elderton* (cited *infra*). In support of the direction in its decree that the partnership should be dissolved, the Court mentioned *Van Sandau v. Moore* (b), *Wheeler v. Van Wart* (c), *In re The Electric Telegraph Co. of Ireland* (d), *Jennings v. Baddeley* (cited *infra*), and *Bailey v. Ford* (e).

From this decree Kávasji Nánábhái appealed to the Privy Council, and on the 29th day of February 1868 the Lords of the Privy Council generally affirmed the decree, with, however, two variations. The first was made by inserting at the beginning the words "This Court doth declare that the charges

(a) 10 C. B. 612, 632.

(b) 1 Russ. 463.

(c) 2 Jur. 292, and 9 Sim. 193.

(d) 22 Beav. 471.

(e) 13 Sim. 495.

of fraud and dishonesty against the defendant Kávasji Nánábhái, contained in the bill of the plaintiffs, are not proved by any evidence in the cause, and that the said defendant ought to receive from the plaintiffs the costs of and occasioned by such charges, and this Court directs the same to be taxed accordingly, but reserves any directions for the payment thereof until the further consideration of this cause ;” their Lordships being of opinion that charges of fraud, if proved at all, should be so at the hearing, and not reserved until a later stage in the cause, as they should not be kept hanging over the defendant. The second variation was made by inserting, after the reservation of the consideration of the claim of Kávasji Nánábhái to commission upon the funds to be realised by a sale of the partnership property, the following words : “ And this Court doth also, but without prejudice, reserve until further consideration the question whether Kávasji Nánábhái is entitled to any, and, if any, what compensation in respect of the engagement in the articles that the defendant Kávasji Nánábhái should have the management of the partnership, and should be the agent and broker thereof during his life.” This variation was made because their Lordships were of opinion that it was more convenient that the question of right to compensation should be decided in the equity cause than by an action at law. The parties respectively were directed to bear their own costs of the appeal to the Privy Council.

In accordance with the directions in the decree, the Master realised the assets of the Throstle Mill Company, paid its debts, and took the accounts.

On Kávasji Nánábhái’s account with the partnership from its commencement to its dissolution the Master found that there was due from Kávasji Nánábhái to the partnership the sum of Rs. 689-12-10.

On Kávasji Nánábhái’s account with the partnership from its dissolution to the day when Kávasji Nánábhái commenced to act as receiver (20th February 1863) the Master found that there was due from Kávasji Nánábhái to the partnership the sum of Rs. 2,021-2-10.

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On Kávasji Nánábhái's account as receiver the Master found that the partnership was indebted to Kávasji Nánábhái in the sum of Rs. 589-9-2.

Neither side objected to the Master's report, and the case came on for further consideration, and for argument on the question of the right of Kávasji Nánábhái to commission on the funds realised by the sale of the partnership property, and to compensation for being deprived of his management of the partnership, and of the benefit of acting as its agent and broker.

The case was argued before WESTROPP, C.J., and BAYLEY, J.

McCulloch and *Latham* appeared for the plaintiffs and defendants in the same interest as the plaintiffs.

The Honorable A. R. Scoble and *Macpherson*, for Kávasji Nánábhái, admitted that it must be considered that the dissolution of the company, as decreed by the High Court and affirmed by the Privy Council, was a proper one in the interests of the shareholders, but contended that as it was brought about by the plaintiffs themselves, without the consent of Kávasji Nánábhái, he was entitled to compensation for the commission upon yarn, which during his lifetime the company had agreed to pay him. They relied upon *Stirling v. Maitland* (*f*), which, they contended, had in effect overruled *Aspdin v. Austin* and *Dunn v. Sayles* (*g*), previously much commented on in *Emmens v. Elderton* (*h*). They also relied upon *Pilkington v. Scott* (*i*), *Emmens v. Elderton*, *Reg. v. Welch* (*j*), and *M'Intyre v. Belcher* (*k*), and on remarks made by Lord Westbury upon the question of compensation during the argument of this case before the Privy Council, and said that the winding up of the company had been the wilful act of the company, and had not been occasioned by any misconduct on the part of Kávasji Nánábhái, and there was no reason why the ordinary rule

(*f*) 34 L. J., Q. B. 1. (*g*) 5 Q. B. 671, 685.
 (*h*) 4 Ho. Lo. Ca. 624; S. C. 13 C. B. 495; 6 C. B. 160.
 (*i*) 15 M. & W. 675. (*j*) 22 L. J., Mag. Ca. 145.
 (*k*) 32 L. J., C. P. 254.

should not be followed, and compensation awarded to Kávasji Nánábhái for the loss he had sustained by the plaintiffs' breach of contract.

Latham, contra, contended that, as there was no express covenant on the part of the company not to dissolve itself during the lifetime of Kávasji Nánábhái, the court would not imply such a covenant on their part. He relied upon *Aspdin v. Austin* and *Dunn v. Sayles* as binding authorities in his favour. He distinguished *Pilkington v. Scott, Reg. v. Welch*, and *M'Intyre v. Belcher*, and relied upon the following authorities:—*King v. The Accumulative Life Fund and General Assurance Co.* (l); *Beswick v. Swindells* (m); *Tasker v. Shepherd* (n); *Taylor v. Caldwell* (o); *Smith on Master and Servant*, p. 54; *In re English Joint Stock Bank*; *Yelland's Case* (p); *In re London and Colonial Company, ex parte Clark* (q); *In re London and Scottish Bank, ex parte Logan* (r); *In re English and Scottish Insurance Company ex parte Maclure* (s); *Burton v. Great Northern Railway Co.* (t).

Scoble in reply.

Cur. adv. vult.

WESTROPP, C.J. (after stating the facts of the case, and the proceedings in Bombay, and on appeal to the Privy Council and subsequently in the Master's office, and after adverting to the state of the accounts of Kávasji Nánábhái as found by the Master, continued*) :—The result of the ordeal in the Master's office, therefore, is that Kávasji Nánábhái has, so far as his accounts are concerned, come out of it entirely free from imputation of fraud; for if, notwithstanding the

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- (l) 3 C. B., N. S., 151. (m) 3 Ad. & E. 868. (n) 6 H. & N. 575.
(o) 3 B. & S. 826. (p) L. Rep. 4, Eq. 350. (q) 7 *Ibid.* 550.
(r) 9 *Ibid.* 149. (s) L. Rep. 5, Ch. App. 737. (t) 9 Exch. 507.

* His Lordship also stated that he had sat in the case with reluctance, as he had originally been counsel in it for the plaintiffs, but that the learned counsel on both sides, and especially counsel for the defendant Kávasji Nánábhái, had requested that he should sit; that nevertheless he would not have done so if there had been another Judge available. It was considered desirable, as well by the parties as by the court, that two Judges should sit in the first instance, to avoid the necessity of an intermediate appeal if the parties should not be satisfied with the judgment of the Court.

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variation made in the decree by order of the Privy Council, it had been possible for the plaintiffs to have preferred charges of fraud in the accounts before the Master, it seems manifest that they would have failed in proving them. The accounts as found by the Master must be taken as correct. They have not been excepted to.

The balances against Kávasji are trivial, and merely such as might be expected in managing an undertaking so considerable as the Throstle Mill.

And now the question "whether Kávasji Nánábhái is entitled to any, and, if any, what compensation in respect of the engagement in the articles that he should have the management of the partnership, and should be the agent and broker thereof during his life," is substantially the only question of importance (except that of the costs of this suit so far as they have not been provided for by the order of the Privy Council) which awaits decision. A claim by Kávasji Nánábhái, as receiver, for commission on the proceeds of the sale of the mill, has been abandoned on his behalf by Mr. Scoble, those proceeds never having come into the hands of Kávasji Nánábhái. The question of compensation has been reserved for our consideration "without prejudice," and great pains were taken by Lord Westbury in wording the decree in such a manner, as to leave this court perfectly untrammelled. Some observations certainly fell from Lord Westbury in the course of the argument bearing on Kávasji Nánábhái's right to compensation, but it is to the reservation of the question of compensation, as expressed in the first variation made by their Lordships in the decree, that we must have regard. It is evident that Lord Westbury, as well as the other members of the Board, intended to leave the question completely open.

The question of compensation has been argued on both sides, before my brother Bayley and myself, with ability and research, and many cases have been cited, which have more or less bearing upon the question. But the greater number of these cases were simply between master and servant, and though some were not so, yet none of the cases

cited on either side are on all fours with this case. The agreement here is peculiar, and so are the circumstances which have occurred subsequently to its date and previously to the filing of the bill.

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This is not the ordinary case of master and servant, but is that of the founder of a company, in which he is a partner, and of which he has become the manager, broker, and agent. We propose to consider the case in two ways ; first we will consider what view an intelligent man of business, unenlightened by a knowledge of the authorities, and not interested in the agreement, would take of the meaning of that agreement. Would it not be that the weal or woe of the company should be the weal or woe of its founder ? That his copartners had not joined in the undertaking merely for the purpose of providing commission for him, whether or not the enterprise itself resulted in loss. That, if it did result in loss, he could not have any rational claim for compensation against his copartners for leading them to disaster. And that the absence of any stipulation for the payment of wages to the founder, the dependence of his remuneration on commission upon sales, and the specification of the amount of capital to be invested, suffice to indicate that the copartners intended to make the welfare of the founder depend on that of the factory, of which he had the management.

The rational intention to infer from the agreement would be, that if the undertaking on its stipulated capital can produce yarn, yarn shall be produced, and the founder shall, during his life, have a commission upon the sale of it. But it would seem highly unreasonable to suppose that if that capital be insufficient to work the mill, nevertheless the copartners shall be compelled to increase the capital in order that yarn shall be made for the founder to sell, at all hazards and losses to the company, or to compensate him for the absence of sales and their consequent commission—an absence caused by the unsoundness of the basis on which he founded the enterprise.

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It does not, on the other hand, lie in his mouth to say that the capital, if properly and judiciously expended, would have sufficed to set the mill to work and to keep it so. He himself had the laying out and application of the capital, and if he have not judiciously managed it, the equity of the matter is that he should accept the consequences.

He would have, on that hypothesis, nothing to blame except his own negligence or want of skill, as the case might be.

The balance of legal authority is, we are happy to say, in our opinion, in favour of the view which we think common sense and common justice, unaided by authority, would take of such a case.

Before reviewing the authorities, we desire to say that we are quite satisfied that the capital of the company was fixed by the agreement of the 10th of January 1857 at three lákhs of rupees, namely, 100 shares of Rs. 3,000 each, and that without the consent of all the partners that capital could not be increased. "When the agreed amount of capital of a partnership has been exhausted, and the business cannot be carried on to a profit, the partnership will be dissolved. A partner cannot be compelled to furnish more capital than he has agreed to bring in and risk, although he cannot, by limiting the amount of his capital, limit his liability for debts incurred by the firm. The capital of a partnership cannot be either increased or diminished except with the consent of all the members of the partnership" (u). The amount of the capital is part of the constitution of the company, as said by Lord Denman in *Smith v. Golds-worthy* (v).

For the defendant Kávasji Nánábhái the case of *Stirling v. Maitland* (w), decided by the Court of Queen's Bench in November 1864, is mainly relied upon, and especially a passage in the judgment of Cockburn, C.J., at p. 852, where he says: "I look on the law to be that, if a party enters

(u)1 Lindley on Partnership, 615, 379 (2nd ed.); *Jennings v. Baddeley*. 3 K. & J. 78.

(v) 4 Q. B. 430, 465.

into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative. I agree that if the company had come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that the covenant would not have the effect contended for; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue. The transfer of business and dissolution of the company was certainly the act of the company itself, so that they have by their act put an end to the state of things under which alone this covenant would operate." And it was argued with regard to those remarks that the dissolution of the Throstle Mill Company had been effected at the request of the plaintiffs, and that they had thus put an end to the company and broken their implied contract; but we have come to these conclusions—first, that there was no agreement by Kávasji Nánábhái's copartners to carry on the business at all hazards; and secondly, that the dissolution was occasioned by Kávasji Nánábhái's own fault, or by an error common to him and his copartners in founding the company. That case of *Stirling v. Maitland* was a very peculiar case, and greatly differing from the present case. The covenant there expressly contemplated the displacement of the agent. It did not stipulate that the insurance company should not displace the agent, but it provided what should be done in the event of his displacement. And he was displaced without any good or reasonable cause. Moreover, the covenant was not with the agent, Seton, himself, but with Stirling, who had paid off Seton's debt to the company, and to whom it was intended that repayment should be secured by the continuance of Seton in his office of agent, or by rendering the company liable to refund the amount, or so much of it as might remain unpaid by Seton to Stirling in the event of Seton's displacement, before he

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had repaid Stirling. It was argued that the Court of Queen's Bench must be regarded as having there overruled *Aspdin v. Austin* (x) and *Dunn v. Sayles* (y); but those cases were not there mentioned, and it does not appear to have occurred to either the counsel or the court that the principle of those cases was involved in that case of *Stirling v. Maitland*. And none of the cases of the same class as *Aspdin v. Austin* and *Dunn v. Sayles* were there cited.

There were also relied upon for the defendant Kávasji Nánábhái *Pilkington v. Scott* (z), *Reg. v. Welch* (a), and *Hartley v. Cummins* (b). Those were very special cases, and that fact is noticed by Mr. Manley Smith in his work on Master and Servant. But that text-writer deduces—and, as we think, correctly—the general rule to be collected from *Aspdin v. Austin* and *Dunn v. Sayles*, and other cases, as follows:—"Where the contract for hiring merely contains an undertaking on the part of the master to pay certain stipulated wages in proportion to the work done by the servant, there is no implied obligation on the part of the master to find work so as to enable the servant to earn wages. But where the contract of hiring provides for the payment of certain wages (not in proportion to the work done), although it is optional on the part of the master to find work, and he may, if he pleases, discontinue his business, yet he must nevertheless pay the wages agreed on, whether he find work for the servant or not, or he will render himself liable to an action for such damages as a jury may think proper to give." In the present case there is no contract on the part of the company to pay any fixed wages to Kávasji Nánábhái. He is left for his remuneration to his commission on the sales of yarn that he may effect, and we do not think that we can in this case infer an agreement on the part of the company to continue to manufacture yarn for the purpose of allowing Kávasji Nánábhái to earn his commission. There is no such provision, with reference to notice, as was found in *Pilkington v. Scott* and the cases that followed it.

(x) 5 Q. B. 671. (y) *Ibid.* 685.

(z) 15 M. & W. 657. (a) 2 El. & B. 357. (b) 5 C. B. 247.

In *Asplin v. Austin* (c) the facts were that, by an agreement between the plaintiff and the defendant, the plaintiff agreed to manufacture, for the defendant, cement of a certain quality; and the defendant, on condition of the plaintiff's performing such engagement, promised to pay him £4 weekly during the two years following the date of the agreement, and £5 weekly during the year next following, and also to receive him into partnership as a manufacturer of cement at the expiration of three years; and the plaintiff engaged to instruct the defendant in the art of manufacturing cement. Each party bound himself in a penal sum to fulfil the agreement. The defendant afterwards covenanted by deed for the performance of the agreement on his part. It was in that case held that the stipulations in the agreement did not raise an implied covenant that the defendant should employ the plaintiff in the business during three or two years, though the defendant was bound by the express words to pay the plaintiff the stipulated wages during those periods respectively if the plaintiff performed, or was ready to perform, the condition precedent on his part. Lord Denman, in giving judgment in that case, after referring to several cases, says: "We have examined these and several earlier cases which were cited in the argument in the latter case, and upon consideration they do not appear to us to support the proposition, for which the plaintiff contends, to the extent to which it is necessary for him to carry it. It will be found in those cases that where words of recital or reference manifested a clear intention that the parties should do certain acts, the courts have, from these, inferred a covenant to do such acts, and sustained actions of covenant for the nonperformance, as if the instruments had contained express covenants to perform them. But it is a manifest extension of that principle to hold that, when parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient, or even necessary, for the perfect performance of their express covenants. *Where parties have entered into written engagements with expressed*

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not, it was considered quite clear, both by the Exchequer Chamber and the House of Lords, that the company was not bound to supply the plaintiff with business as an attorney and solicitor, and to use his services as such, though they were bound to keep him and pay him his annual salary. And that case, in that respect, is in point here. If the company could, without incurring loss, have produced yarn, Kávasji Nánábhái would perhaps have been entitled to receive his commission, and if it were not given, the company might have been liable to suit ; but the company did not covenant with him to produce yarn, and the authorities show that such a covenant will not be implied.

If there had been an agreement to pay Kávasji Nánábhái wages, the case would be different as to them, but the distinction is broadly drawn between commission and wages. Baron Parke was, as already said, careful, in giving the judgment of the court, to keep alive *Aspdin v. Austin* and *Dunn v. Sayles*. In his judgment he says : “ Our decision in this case does not conflict with that of the Queen’s Bench in *Aspdin v. Austin* and *Dunn v. Sayles*. Both these cases turned upon the construction of the covenants of the parties. In the former the defendant covenanted with the plaintiff to perform all the stipulations in a former agreement between the defendant, a third person, and the plaintiff; and the question was whether the former agreement—which was on the part of the plaintiff to make cement for the defendant and one Hales, and to teach them how to do so, and on the defendant’s and Sealey’s part to pay a weekly salary for three years, and then to take the plaintiff into partnership, implied a promise by them to continue to employ him to manufacture cement for the intermediate period. The court could not draw any such inference : and Lord *Denman*, in giving judgment, assigns a very strong reason, that the breach assigned by the plaintiff assumed that the defendant, at however great loss to himself, was bound to continue his business for three years : but the defendant had not covenanted to do so ; he covenanted only to pay weekly sums for three years, on condition of his performing the conditions pre-

cedent; and that he would be entitled to recover those sums, whether he performed them or not, so long as he was ready and willing and offered to perform them, and was prevented only by the defendant from so doing. The other case also depends on the construction of the defendant's contract: the indenture there did not contain the terms 'it was agreed,' which would have made them the words of both parties. It was a simple covenant by the defendant. The plaintiff covenanted that his son should serve as an apprentice to a surgeon-dentist; the defendant, in consideration of his services, covenanted to pay weekly sums for five years: and the court held that there was no covenant to be implied, from the covenant to pay, that the defendant should continue him in the employment of assistant. Lord *Denman* says the reasons assigned in the former case equally applied to that: and, indeed, it would be a strong thing to say that the plaintiff covenanted to carry on the business of surgeon-dentist, at whatever loss or inconvenience, for five years."

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And so we say here that it would be a strong thing to say that the shareholders covenanted with Kávasji Nánábhái to manufacture yarn for his benefit during his lifetime, and for that purpose to subscribe capital indefinitely beyond the amount named in the agreement. In the judgment which Baron Parke delivered in the House of Lords he repeats those remarks which he had made in the Exchequer Chamber, and he is not the only Judge who refers to *Aspdin v. Austin* and *Dunn v. Sayles*. Crompton, J., says: "The cases of *Aspdin v. Austin* and *Dunn v. Sayles* must, I think, be considered as decided upon the construction of the particular covenants and the peculiar circumstances in those cases. If they are to be taken as deciding that there is no obligation on the part of the employer to continue the relation between the parties, in cases like the present, or that, where there is an agreement to employ and serve for a specified time at a specified salary, an action is not maintainable against the employer immediately for a wrongful termination of the relation, but that the party discharged, instead of suing for damages immediately, must wait and remain idle till the end

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of the specified period, and then sue for the salary as a sum certain, I should think that they ought not to be supported in a court of error. ”

And Erle, J., speaks to the same effect: “ It has been contended, on the authority of *Aspden v. Austin*, and *Dunn v. Sayles* that in cases of contracts for service and for salary during a time, the employer may put an end to the employment before the time is expired, and is not liable to any action if at the period for payment of salary he pays the amount. But I presume that no such general doctrine was intended to be laid down at the time when the Court put a construction upon the contracts in those two cases. If it was, I must express my dissent from it.” And there was no such doctrine, in fact, laid down. No doubt, if a man is to be paid a fixed salary for a fixed time, he is entitled to be paid that salary, but during that time his employers would not be bound to find business for him in order that he might earn his fees for performing it. In the case of *Emmens v. Elderton*, Maule, J., differing from the other Judges, adhered to the opinion he had expressed below, and it is impossible to read his judgment without thinking that there are weighty considerations to support his view, and so thought Lord Truro, but the still more weighty considerations on the other side prevailed.

Beswick v. Swindells (f) shows how averse the courts are to insert a condition into an agreement which the parties to it did not actually contemplate at the time of entering into it. That was an action on a bond for payment of £400, wherein it was recited that the obligor was about to marry a linen-draper, and thereby to become possessed of a considerable stock in trade, and that it was agreed that in consideration thereof he should execute a bond to the obligee to pay to the children of his future wife by her former husband £300 within twelve months after his wife's death, and the condition of the bond was that if the obligor should, within twelve months next after the decease of his wife, pay to her child or children £300 if upon an account of the stock in trade,

(f) 3 Ad. & E. 868.

if then carried on by the obligor, the same should amount to £400; but in case the stock in trade should amount to less than that sum, then if the obligor should pay to the children £120, the obligation should be void. The plea was that the wife had died, and that the obligor had, both before her death and ever since, ceased to carry on the business, and that he had not, at the time of her death, or since, any stock in trade. The replication was that at the end of twelve months after the wife's death there were children of the wife by her former husband alive. It was held in demurrer that the obligor might discharge himself by pleading that he had discontinued the business. No doubt, in the case before us, words similar to "if then carried on by the obligor," which are found in the bond in *Beswick v. Swindells* do not occur in the agreement, but a passage in the judgment of Tindal, C. J., is very applicable :—"The event," he says, "which has actually happened, namely, that the trade and business were actually given up and abandoned long before the wife's death, appears to us to be an event not provided for by the agreement. It is a *casus omissus*, and we think we should make an agreement for the parties, instead of putting a construction upon that which they have made for themselves, if we should hold that the defendant was bound, under this condition of the bond, to pay either of the two sums therein mentioned in the event which has actually taken place. The construction contended for by the plaintiff would either make it compulsory on the husband to carry on the trade during the life of his wife, though it became a failing or even a ruinous concern to the husband; or would render him liable to the payment of the money in the event of his yielding to the pressure of unforeseen circumstances, and of his giving up the business. And we think if the parties had intended this, they would have used the very simple expedient of making the bond conditional for the payment of a certain sum of money within twelve months after the death of the wife." And so, in this case, we think that, if the shareholders had intended that Kávasji Nánábhái should have had his commission in the event of the company proving unsuccessful, they would have expressed it in strong terms in the

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agreement. In *Tasker v. Shepherd* (g), decided in 1861, the Court of Exchequer approved of *Beswick v. Swindells*. Both show the disinclination of the court to extend the contract that the parties to it have entered into, and to imply terms which the parties might have, but have not, expressed. To the like effect is *Burton v. The Great Northern Railway Co.* (h), where the plaintiff, on the 1st of October 1851, entered into an agreement with the defendant's company to provide all horses, wagons, &c., necessary for the cartage of grain and merchandise between Hatfield and Ware, and to convey all that might be presented to him for that purpose between the above points at the rate of five shillings per ton, and it was mutually agreed that the agreement should continue in force for twelve months from the date of the agreement. The plaintiff purchased horses and wagons, but the railway company, in consequence of their having leased a portion of their line to another company, and bound themselves not to carry between Hatfield and Ware, gave the plaintiff notice that the arrangement would cease from the 1st of April 1852, and after that date presented no more goods for the defendant to carry,—having in fact none to present; and it was held that the only contract on the part of the defendants was to pay the stipulated price for the carriage of such goods between Hatfield and Ware as might be presented to the plaintiff for that purpose, and that there was no breach of that contract committed, for no goods were presented. Parke, B., likens it to the case of *Aspdin v. Austin*, and in the course of the argument says that it would be a parallel case if a person agreed with a wine-merchant to purchase from him all the wine which the former might choose to drink during a year, and before six months expired he gave notice that he would discontinue drinking wine. That (*Burton v. The Great Northern Railway Co.*) was a hard case on the plaintiff, who was a stranger to the company. The company had no reason for discontinuing the carriage of goods, and yet, as the company had not expressly covenanted to supply goods, it was held that the plaintiff was not entitled

(g) 6 H. & N. 575.

(h) 9 Exch. 507.

to damages. The dissolution here operates as a notice to the plaintiff that no more yarn will be manufactured for him to sell.

King v. The Accumulative Life Fund and General Assurance Company (i), cited by Mr. Latham, is an important case, and has much bearing upon the one before us. The plaintiff effected a policy with the company upon, and for twenty years' continuance of, the life of himself. By the terms of the policy it was provided that "the capital stock and other securities, funds, and property of the company remaining at the time of any claim or demand unapplied and undisposed of, and inapplicable to prior claims or demands, should alone be liable to answer and make good all claims and demands upon the company, and that no director, officer, or shareholder should be individually or personally liable. The plaintiff, as a policy-holder, was entitled to a share in the profits of the company. The directors having transferred its funds and property to another company, who were to take over their liabilities, the plaintiff brought an action against the original company, charging them with having wrongfully aliened and transferred their property and ceased to carry on business, whereby the plaintiff lost the moneys and profits he would otherwise have made from the continuance of the contract. It was held that there was no implied contract on the part of the company to continue to carry on the business. On this point Cockburn, C. J., says: "It has been contended that an implied covenant on the part of the defendants to continue the business of an insurance company, and to keep its funds available to answer claims on policies, arises on that part of the policy which provides that 'the capital stock and other securities * * * shall alone be liable to answer and make good all claims and demands upon the company, and that no director, shareholder, &c., shall be personally liable or subject to any such claims or demands, or in any wise charged by reason thereof, beyond the amount unpaid of his shares in the said capital stock, nor longer than he shall retain the said

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(i) 3 C. B., N. S., 151.

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shares.' It does not appear to me that any implied covenant, such as is contended for, arises from that proviso." To the same effect speaks Vaughan Williams, J., at p. 165 : " The question then is whether there is any implied covenant—there being none expressed—that they will continue so to carry on their business. I am of opinion that there is not. Even if the deed of settlement were out of the question, it seems to me to be impossible to say that the policy amounts to anything more than a contract that the plaintiff or his executors shall receive the sum assured when the time for payment shall have arrived. *It is difficult to imply, from the circumstance of the policy-holder being entitled to a share of profits, a contract on the part of the company that they will, in order to give him a better chance of profits, continue to carry on the business supposing it should turn out to be disadvantageous to them to do so.* The difficulty is still further increased by the consideration that if such a covenant is to be implied, it might equally be implied that the company bound themselves to carry on the business with diligence. I see many cogent reasons why we should not infer a covenant such as is suggested." Crowder, J., was of the same opinion.

In *Taylor v. Caldwell* (h), the facts of which are not in point in the present case, there are certain observations made by Blackburn, J., which are both reasonable themselves, and correctly indicate the rule of law by which the courts are guided in coming to a conclusion with reference to implied contracts. "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome, or even impossible. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears

(h) 3 B. & S. 826.

that the parties must from the beginning have known that it could not be fulfilled, unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done ; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For, in the course of affairs, men, in making such contracts, in general would, if it were brought to their minds, say that there should be such a condition." Now, in the case before us, if the matter had been before their minds, would the partners in the Throstle Mill have agreed to pay Kávasji Nánábhái in the case of the mill turning out unprofitable, or being unable to continue to work on the agreed capital ? Adopting the reasoning in the case we have last referred to, we think they would not have so agreed, and that, unless so compelled by the words used, we ought not to make or infer such an agreement for them. This review of the cases brings us clearly to the opinion that the partners in the Throstle Mill Company were not, either by reason of anything they have expressed, or by reason of any covenant that the law will imply, bound to continue the working of the mills in order that Kávasji Nánábhái might obtain a commission on the yarn manufactured by the mills, or to pay compensation for the loss of that commission.

I shall now turn to the consideration of a class of cases in which compensation has been given to servants of a company when it has been wound up. The conclusion we draw from these cases is in accordance with the views we have expressed already.

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In *Yelland's Case* (i), where compensation was given to the manager of a bank which was being wound up by order of court, he had been engaged for a fixed period (five years) at a fixed salary (£500 per annum). In *Ex parte Clark* (j) there was also an engagement for a fixed period (five years) at a fixed salary (£50 per annum), and also certain commission; but, in the order directing an account to be taken of what was due to him, no provision seems to have been made for estimated commission which might have become payable during the unexpired portion of his term of service, if he had not lost his appointment by the winding up of the company. In *Ex parte Logan* (k) there was a fixed salary of £800 per annum, with a proviso for its being increased to a certain extent in the event of certain profits being realised by the bank, and an express stipulation for compensation to him, in the event of loss of his office for any other cause than gross misconduct, to the extent of three years' salary, to which, on the winding up of the bank, he was declared entitled.

In *Hartland v. The General Exchange Bank* (l), not cited in argument, it was held, at *Nisi Prius*, in 1866, by Willes, J., that in estimating damages for the wrongful dismissal of a servant, the jury should take into account the salary, and not any commission, obtained by him. That is a clear authority for the conclusion at which we have arrived.

Independently of the frame of the contract here, we are of opinion, that, even if the company had covenanted to carry on business during the lifetime of Kávasji Nánábhái, yet, inasmuch as Kávasji Nánábhái mainly contributed to the dissolution of the company, he is not entitled to compensation. We think he did this, and in the following manner:—

I. He incurred an unauthorised debt nearly equal in amount to half of the original stipulated capital. And he did this without consulting the shareholders, or ascertaining from them whether they would consent to a further extension of the capital. They had once previously increased it, and

(i) L. R. 4, Eq. 350. (j) L. R. 7, Eq. 550. (k) L. R. 9, Eq. 149.
 (l) 14 L. T., N. S., 863.

were not for that reason bound to do so again, unless such
were their pleasure.

II. He pertinaciously insisted upon making calls after all the capital and one lách of rupees more had been subscribed, and threatened to forfeit the shares if the calls as made by him were not paid.

III. He manufactured voters, in violation of the spirit of the 6th clause of the Agreement.

His Lordship stated the facts in connection with these matters, and concluded by saying that for these reasons the Court was of opinion that Kávasji Nánábhái forced the dissolution of the company—a company which he had himself founded upon an insufficient basis—and that he was not entitled to compensation.*

Attorneys for the plaintiffs: *Keir, Prescott, and Winter.*

Attorneys for Kávasji Nánábhái: *Manisty and Fletcher.*

* As to costs, the Court stated that, as directed by the Privy Council, Kávasji Nánábhái should have the costs of and incidental to the charges of fraud, and that the plaintiffs should have from him the costs of and incidental to his claim for compensation, and that these two classes of costs might be set off against each other, and the balance paid by the party against whom it might be, and that the parties should respectively have their costs in the Master's office, and the costs of suit other than above mentioned, out of the partnership estate. The costs of the appeal had already been provided for by the Privy Council.

In lieu, however, of the above direction, the following order was, upon the consent and at the desire of the parties, substituted:—The defendant Kávasji Nánábhái waiving his right to costs of the charges of fraud made against him, let all parties have, out of the funds in court in this cause, their costs as between solicitor and client (including the costs of the resistance of the plaintiffs to the application made, in October 1863, by the purchaser of the Mill), excepting the costs of the appeal already provided for by the Privy Council.

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UTAMCHAND MA'NIKCHAND *Defendant.*

In re Gopálrav Myrál.

Order to compel Property to be delivered to Sequestrators—Persons ordered without Jurisdiction—Residence—Constructive Inhabitancy—Jurisdiction—Service—Writ of Sequestration—Order in personam.

An inhabitant of Barodá who carries on the business of a banker at Bombay by a *munim*, and has a place of business there, is constructively an inhabitant of Bombay, and as such is subject to the orders and process of the High Court in the exercise of its Equity jurisdiction, as provided by Sec. 41 of the Charter of the late Supreme Court, and continued to the High Court by the Act under which it was established.

A person appearing to discharge a rule thereby waives all objections to the formality of the service of the rule upon him.

The High Court will assert its jurisdiction for the purpose of preventing a writ of sequestration issued by it from becoming a mere form, and under proper circumstances will operate *in personam* where the property sought to be sequestered is outside its jurisdiction.

IN the above cause (the earlier proceedings in which will be found reported in the High Court Reports, Vol. VII., p. 172 O. C. J., and *antè*, p. 135) *Anstey*, on the 30th of September 1871, obtained a rule *nisi* directed to Ráv Sáheb Gopálráv Myrál, calling upon him to show cause why he should not deliver up to the sequestrators appointed in the suit certain jewellery, pearls, and other property in his custody or power belonging to the defendant, Utamchand Mánikchand.

In the affidavit of the plaintiff (which was supported by other affidavits) it was alleged that the defendant, Utamchand, shortly before he was delivered up to the Sheriff's officer at the Barodá railway station, deposited with Ráv Sáheb Gopálráv Myrál (described as a wealthy and highly respected merchant and *sávkár* or shroff of Barodá and Bombay), for safe custody, all Utamchand's jewels and pearls, worth several lákhs of rupees, on Utamchand's account; that Gopálráv Myrál was then only a private merchant, but was subsequently appointed *Diván* of H. H. the Gáikvád;—that he carried on business at Bombay by means of a *munim*, Vishnu Pant; that after the imprisonment of the defendants, Gopálráv Myrál

directed his *munim* in Bombay to pay over to the defendant Utamchand four and a half lákhs of rupees for the purpose of settling the plaintiff's claim against Utamchand, but that Utamchand had not settled the claim, and that the plaintiff had proceeded to Barodá with Mr. Jefferson (the receiver and one of the sequestators) and requested Gopálráv Myrál to deliver up the jewellery and pearls to Mr. Jefferson; and that Gopálráv Myrál had thereupon told him that the jewellery and pearls had been deposited with him as a *sávkár*, and that the other *sávkárs* of Barodá would laugh at him if he delivered them up without the authority of Utamchand, and he refused to part with them.

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On the part of Gopálráv Myrál it was not denied that he had possession of the jewellery and pearls of Utamchand, but Vishnu Pant, Gopálráv's Bombay *munim*, gave, in his affidavit made for the purpose of showing cause against the rule, the following account of the manner in which the jewellery and pearls had come into the possession of Gopálráv, and of the way in which he had afterwards dealt with them :—

Shortly after the death of H. H. Khanderáv, the late Gáikvád of Barodá, the present Gáikvád, H. H. Malhárráv, put the defendants, Utamchand, Ghellábhái, and Tulsidás under surveillance.

The said defendants remained under surveillance until they were delivered up at the Barodá railway station to the special bailiff of the High Court in February 1871.

H. H. the Gáikvád Malhárráv also attached and seized, and otherwise took possession of, the property of the defendants Utamchand and Ghellábhái situate in Barodá, for various causes of a mixed character, and such property consisted, amongst other things, of jewellery, pearls, and other precious articles, as mentioned in the affidavit of the plaintiff. The defendants, Utamchand, Ghellábhái, and Tulsidás, shortly before their delivery up at the Barodá railway station, prayed H. H. the Gáikvád Malhárráv for indulgence and assistance, whereupon H. H. delivered and deposited

1871. the jewellery and precious articles with Gopálráv Myrál, who
 HART'VAL- was then only acting as a banker to His Highness, and
 LABHDA'S desired Gopálráv to lend and advance to Utamchand, Ghel-
 KALLIA'NDA'S lábhái, and Tulsidás, and to assist them, to the extent of not
 v. more than Rs. 4,50,000, on the security of the jewels, and
 UTAMCHAND H. H. then instructed Gopálráv Myrál not to part with the
 MA'NIKCHAND. jewels, &c. to any of the defendants, or to their order, with-
 out his express permission, to which Gopálráv Myrál agreed.

In pursuance of this arrangement, and under the express order of H. H. the Gáikvád, Gopálráv Myrál gave Utamchand, Ghellábhái, and Tulsidás a letter of credit for Rs. 4,50,000 on his Bombay firm.

In pursuance of this order, Vishnu Pant, acting as the Bombay *munim* of Gopálráv Myrál, paid to Jagjivandás Vandrávandás, the *munim* of Utamchand, on certain dates that he specified, various sums amounting in all to the sum of Rs. 4,49,423-13-1, and that sum, with interest at the rate of six per cent. per annum and premium, was due, at the time of the rule, from Utamchand, Ghellábhái, and Tulsidás, to Gopálráv Myrál, upon the security of the jewellery, &c. that had been deposited with him by H. H. the Gáikvád; and Gopálráv claimed to retain the jewels, &c. until his claim should be paid, and an order should be given by H. H. the Gáikvád for the delivery up of the property. About Rs. 47,000 were, in addition to the above sum, alleged to be due to Gopálráv Myrál from Utamchand.

The rule came on for argument before SARGENT, J., on the 13th of October 1871.

Badruddín Tyebji showed cause on behalf of Gopálráv Myrál, and contended that the service of the rule was insufficient and improper; that the court had no jurisdiction to grant the rule, as Gopálráv was not personally subject to the jurisdiction of this court and the property was at Barodá, so that if the court made the order it would have no power to execute it; that Gopálráv had received the jewels not from Utamchand, but from H. H. the Gáikvád, and that the court would not make an order commanding

Gopálráv to do that which he could not do without disobeying his own sovereign prince ; and that as Gopálráv had advanced money upon the jewels *bonâ fide* as a banker, he had a lien upon them until his claim was satisfied. He cited *Harivallabhdâs Kalliândâs v. Utamchand Mânichand* (a); *Cassim Azim v. Cassim Mahomed* (b); *Sagore v. Ramchunder* (c); *In re Abraham* (d); *Hâji Jivâ Nur Muhammad v. A'bubakar Ibrâhim* (e); *The Carron Iron Company v. Maclaren* (f); Kerr on Injunction, pp. 8, 9. As to bailment and lien, Colebrooke's Digest, Bk. I., Ch. I., Sec. 2 ; and Ch. VI.; and *Chase v. Westmore*, and the notes thereto, in Tudor's Leading Cases on Mercantile Law. p. 679 (2nd edn.).

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Anstey, in support of the rule, relied upon *Francklyn v. Colhoun*, and cases referred to in the notes to that case in 3 Swanston's Reports 277, and referred to *McCarthy v. Gould* (g), *Wilson v. Metcalfe* (h), *Simmonds v. Kinnaird* (i), and *Clinton v. Clinton* (j). As to service, *M'Gusty v. Frazer* (k), *Ex parte Crawford* (l).

Cur. adv. vult.

SARGENT, J. :—In this case a rule *nisi* was granted on the application of the plaintiff in the suit of *Harivallabhdâs Kalliândâs v. Utamchand Mânichand* and others, calling on Râv Sâheb Gopálráv Myrál to show cause why he should not give up and deliver over to the sequestrators, named in a writ of sequestration issued in the said suit, the jewellery, pearls, and other property in his custody or power belonging to the said defendant Utamchand Mânichand. Râv Sâheb Gopálráv Myrál appeared by counsel on the day for showing cause. Three preliminary objections were taken on his behalf :—first, that Gopálráv was not within the jurisdiction ; second, that

(a) 7 Bom. H. C. Rep., O. C. J. 172.

(b) 10 Calc. W. Rep., Civ. R. 349.

(c) 1 Hyde, 136.

(d) 6 Bom. H. C. Rep., A. C. J. 170.

(e) 8 *Ibid.*, O. C. J. 29.

(f) 5 Ho. Lo. Ca. 416, 441.

(g) 1 Ball & B. 387.

(h) 1 Beav. 263, 269.

(i) 4 Ves. 735.

(j) Law. Rep. 1 P. & D. 215.

(k) 12 Ir. Eq. 395.

(l) 2 Ir. Ch. 573.

1871. he had not been regularly served ; and third, that the court
 HARI'VAL- had not jurisdiction to make the order asked for. Now,
 LABHDA'S it was admitted that Gopálráv Myrál resides at Barodá, but
 KALLIA'NDA'S that he carries on the business of a banker both here and at
 v. Barodá—at the former place by means of his *munim*, Vishnu
 UTAMCHAND Trimbak, under the name of Gopálráv Myrál. There can be
 MA'NIKCHAND. no doubt, therefore, that he would be liable to be made a
 defendant to a suit in this court under Sec. 12 of the Letters
 Patent of the High Court. This section is, however, in terms
 confined to suits and actions, and would not, I apprehend,
 be applicable to a motion of this nature, Gopálráv Myrál
 not being even a party to the suits in which the writ of
 sequestration was issued by this court. The question of
 jurisdiction has, therefore, to be determined by Sec. 9 of Act
 24 & 25 Vict., c. 104, under which the High Courts of
 Judicature in India were established. By that section (9) it
 is provided that each of the High Courts to be established
 under the Act shall have and exercise all such civil jurisdic-
 tion, and all such powers and authority for and in relation to
 the administration of justice in the Presidency in which it is
 established, as Her Majesty may by Letters Patent grant
 and direct; and, save as by such Letters Patent may be other-
 wise directed, the High Court may exercise all jurisdiction,
 and every power and authority whatsoever, in any manner
 vested in any of the courts of the same Presidency abolished
 under that Act, at the time of the abolition of such court.
 Now, by the Charter of the Supreme Court of Bombay at
 the time of its abolition, it was provided, by Sec. 41, that the
 Supreme Court should be a Court of Equity, and have equit-
 able jurisdiction over the person or persons therein before
 described and specified or limited for its ordinary jurisdic-
 tion, and should and might have full power and authority to
 administer justice in a summary manner according, or as
 near as may be, to the rules of the High Court of Chancery
 in Great Britain, and to compel obedience to its decrees and
 orders in such manner and form, and to such effect, as the
 Lord High Chancellor of Great Britain doth or lawfully may,
 or as near the same as the circumstances and condition of the
 places and persons under their jurisdiction, and the laws,

manners, customs, and usages of the native inhabitants, will admit. The question is, therefore, whether Gopálráv Myrál is one of those persons described and specified for the ordinary jurisdiction of the late Supreme Court; in other words, is he an inhabitant of Bombay as contemplated by Sec. 29 of the Charter of the Supreme Court? The same description is found in Stat. 21 of Geo. III., c. 70, where jurisdiction is given to the Supreme Court at Calcutta over inhabitants of Calcutta; and there are numerous decisions of that court that persons carrying on business at Calcutta, although residing out of the local limits of the court's jurisdiction, are constructively inhabitants of Calcutta. It will suffice to refer to the case of *Baboo Jonokey Doss v. Bindabun Doss* (m). Nor does it matter that the cause of action be quite independent of the business carried on in Calcutta. In the case cited, the object of the suit was to take the accounts of a banking business at Nágpur, in which the father of the defendants had been a partner whilst carrying on a separate business at Calcutta,—thus showing, as was urged by Buller, J., in the case of *Dabeypersaud v. Benepersaud*, referred to at page 373 of Vol. I. of Morley's Digest of Indian Cases, that if a person be held to be an inhabitant of Calcutta on account of his carrying on trade, he becomes subject to the jurisdiction of the Supreme Court in all cases. It is plain then that Gopálráv Myrál, who carries on the business of banker in his own name at Bombay by his *munim*, and having a place of business there for the purpose, is constructively an inhabitant of Bombay, and subject to the orders and process of this court in the exercise of its Equity jurisdiction, as provided by Sec. 41 of the Charter of the late Supreme Court, and reserved to this court by the Act under which it was established.

With respect to the service of the rule *nisi*, it is sufficient, for the purpose of this application, to say that Gopálráv Myrál had notice of the rule, and has appeared by counsel to obtain its discharge. Such was the answer given to similar objections by V. C. Wigram in *Green v. Pledger* (n), and by Lord

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(m) 3 Moo. Ind. App. 175. (n) 3 Harc. 169.

1871. St. Leonards in *The Carron Iron Company v. Maclaren* (o),
 HARI'VAL- referring to *Davidson v. Lady Hastings* (p);
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If, then, Gopálráv Myrál is within the jurisdiction, and is to be treated as properly served, it remains to consider whether the court has the jurisdiction to make the order asked for; and if so, whether, under the circumstances, it should be made. With respect to the jurisdiction, it is quite plain, from the case of *Francklyn v. Colhoun* (q) and the authorities cited in the notes, and from the more recent decision of V. C. Wigram in *Empringham v. Short* (r), that this court will assert its jurisdiction to prevent the writ of sequestration from becoming a mere form, in such manner as the circumstances of the case may justify and render most expedient; and acting upon the analogy by which the Court of Equity grants injunctions to obtain indirectly a control over property which is beyond the jurisdiction, the Court, I cannot doubt, would, under proper circumstances, operate *in personam* with a view to prevent its own writ of sequestration from being frustrated.

Now, Gopálráv Myrál has not himself made any counter-affidavit in answer to those upon which the rule *nisi* was granted; but his *munim*, Vishnu Trimbak, has sworn as to his belief in, and the truth of, a statement made to him by his master at Barodá after the issuing of the rule as to the grounds upon which he has hitherto refused to deliver up the jewellery and pearls to the sequestrators. Now the statement of Ráv Sáheb Gopálráv through the medium of his *munim* is this. (His Lordship read the affidavit, and continued).

The grounds, then, as they appear from this statement, upon which Gopálráv refuses to deliver over the jewels, are—*1st*, that they were deposited with him by His Highness the Gáikvád until further orders, with permission to make advances to the defendants to the extent of 4½ lákhs; *2nd*, that he has a lien upon them in respect to his advances made both before and after they were deposited with him.

(o) 5 Ho. Lo. Ca. 451. (p) 2 Keen, 509.

(q) 3 Swan. 277. (r) 3 Hare, 461.

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In the view which I take of this case, it will not be necessary for me, at least at present, to express any opinion on the latter of these objections. With respect to the first objection, it was not contended that this court could make the order in question, if, as a matter of fact, these jewels were taken by His Highness the Gáikvád and deposited with Gopálráv. Such an order, although not in terms, would be virtually an interference with the rights of a sovereign independent prince in a matter which, both as regards the persons concerned at the time and the subject-matter itself, was entirely within his sovereign jurisdiction. To say the least, it would provoke a most inconvenient conflict of authority. But it was said that this statement was incredible, and should be disregarded by the court; that it was not the statement of Gopálráv made by him on solemn affirmation in his own affidavit, and was inconsistent with his never having alluded to the interference of the Gáikvád in his interview with Mr. Jefferson and the plaintiff at the Residency at Barodá so recently as September last. It is impossible not to feel the force of these observations. On the other hand, the history of this case is a peculiar one. The order of attachment issued by this court against the defendants was itself executed by the assistance of the Gáikvád, who handed the defendants over to the British authorities at the Barodá railway station. It is plain, therefore, that he had interfered actively in the matter, and may, therefore, have made the order attributed to him by Gopálráv. The evidence as to the part said to have been taken by the Gáikvád in the deposit with Gopálráv may not be satisfactory. But it was incumbent on the plaintiff to present such a case to the court as would leave no doubt either as to jurisdiction or even conflict of authority. The application being one the ground, if not the object, of which is to compel obedience to an order of this court is one peculiarly within its discretion. It may be that the plaintiff may be able to remove the difficulties which attend his present application, but under the present circumstances I must discharge the rule.

Rule discharged without costs.

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Appeal Suit No. 175.

VIJIA'RANGAM and DA'MODHAR. (*Defendants*) *Appellants*.
LAKSHUMAN and LAKSHMI..... (*Plaintiffs*) *Respondents*.

Hindú Law—Adoption—Giving in Adoption vicariously—A'sura Marriage—Stridhan—Devolution of Woman's Property.

Where a mother, in pursuance of the promise of her deceased husband, allowed her son to be adopted, but did not herself attend at the adoption ceremonies to give him in adoption, but commissioned her uncle to give the boy on her behalf, it was held that the adoption was not on that account invalid.

Amongst Hindús of the Bhandári and other inferior castes the *A'sura* form of marriage (probably derived from a form in use amongst the inhabitants of Hindustán before the introduction of the Brahmanical religion) is more customary than the four approved forms of marriage.

The principal characteristic of the *A'sura* form is the giving by the bridegroom of *Dez*, or a money payment, to the father of the bride.

The etymological import of the word *Stridhan*, and the different views with which it is regarded in the Eastern and Western schools of Hindu Law, pointed out.

The Mitákshará recognises only one class of *stridhan*, and includes in that class *all* property acquired by a woman by inheritance. According to the last-mentioned authority, a woman's *stridhan*, if she has been married by the *A'sura* form, upon her death childless, goes to her mother, her father, and their kindred—(*i. e.*) to the *sapindás* of her father in the first instance, and, failing them, to her mother's next of kin; but if a woman has been married according to one of the approved forms, her *stridhan* descends, upon her death childless, to her husband and his *sapindás*.

Over *stridhan* acquired by inheritance (so far as it consists of immoveable property) a woman's power of alienation is limited.

The Vyavahára Mayúkha also considers property acquired by a woman by inheritance to be *stridhan*, but classes *stridhan* under two heads—*stridhan* in a narrower sense, embracing particular species, for which a peculiar mode of devolution is prescribed, and *stridhan* generally (including *stridhan* acquired by inheritance), which descends in the same line as if the woman had been a male, *i. e.*, to her sons and the rest, and this notwithstanding her having left daughters.

Authorities bearing upon the subject of *stridhan* considered and commented upon.

THIS was an appeal from the decision of BAYLEY, J., made upon the 29th of September 1870.

As the facts are stated in the judgment of the court of appeal, an outline only of them is here given.

The suit was brought by one Yesubái, daughter of Bápu Viṭhobá, to recover from the defendant Ráv Bahádur Vijiárangam Mudliár, possession of two houses situate at

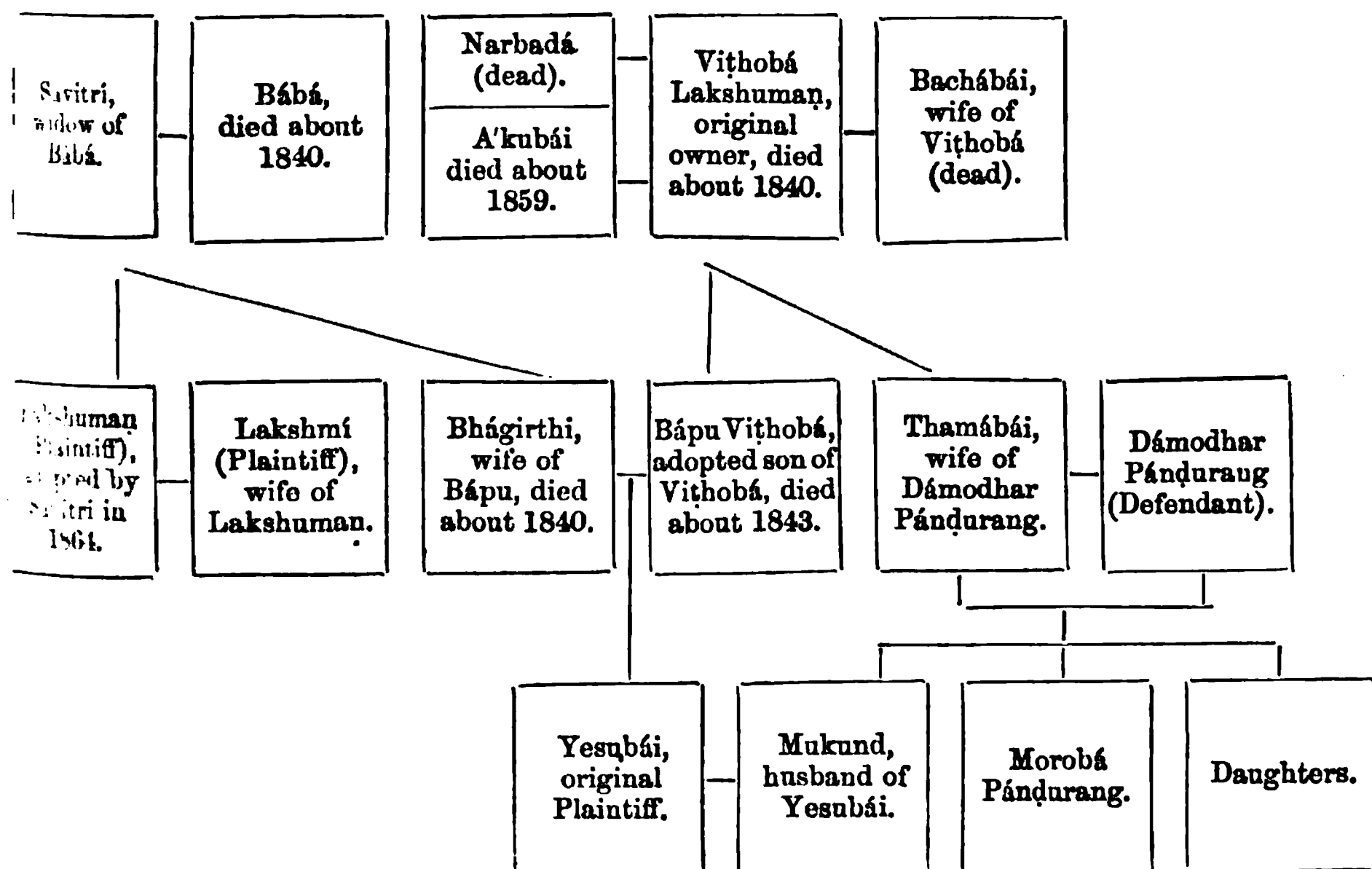
Lower Colábá, which had belonged to her grandfather Viṭhobá Lakshuman, and had descended to her by way of inheritance. She also prayed to have an assignment of the houses by her to the defendant Dámodhar Pándurang and his wife, Thamábái, alleged to have been made on the 21st of September 1860, and a further instrument of conveyance, dated the 5th of October 1860, declared to be null and void, and delivered up to be cancelled, and further to have a conveyance of the premises by the defendant Dámodhar Pándurang to the defendant Ráv Bahádur Vijiárangam Mudliár, dated the 12th of March 1864, declared null and void as against her.

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Before the suit came on for hearing, Yesubái died, and upon the 10th of February 1870 Lakshuman Bábáji and Lakshmi, his wife, were ordered to be admitted as plaintiffs in lieu of Yesubái, without prejudice to, and reserving, the question whether they, or either of them, were or was the heirs or heir of Yesubái. They were, accordingly, made plaintiffs in the suit.

The following pedigree shows the manner in which the plaintiffs on the one hand, and the defendant Dámodhar Pándurang and his wife, Thamábái, on the other, were connected with Yesubái, and how she was connected with Viṭhobá Lakshuman, the original owner of the property :—



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Upon the death of Vithobá, the property in question descended to his adopted son, Bápu. When Bápu died, his daughter, Yesubái, was an unmarried child about five or six years of age. A'kubái, the widow of Vithobá, then came into possession of the property. She died about 1859, having attempted to dispose of the property by her will. An ejectment suit was in 1860 brought against the devisee of A'kubái on behalf of Yesubái, and the property was recovered for her.

The case came on for hearing before BAYLEY, J., on the 21st of July 1870.

The material issues raised were—

I. Whether the plaintiffs were the legal representatives of Yesubái.

II. Whether the agreements or assignments alleged to have been executed by Yesubái were executed by her, and whether they were valid and binding.

III. Whether the defendant Ráv Bahádur Vijiárangam was entitled to retain the property against the plaintiff.

IV. Whether Yesubái was married to her husband, Mukund Dámodhar, by the Bráhma form of marriage, and if not, by what other form of marriage.

V. Whether the plaintiff Lakshuman was legally adopted by Sávitribái.

The issues were found generally in favour of the plaintiffs, and the court declared that Yesubái had been married by the A'sura form ; that the plaintiffs were the heirs and legal representatives of Yesubái ; and decreed the pretended assignments by Yesubái to the defendant Dámodhar Pándurang to be null and void as against the plaintiffs, and ordered them to be delivered up to be cancelled, as also the conveyance from the defendant Dámodhar Pándurang to the first defendant. Possession of the premises was ordered to be given up to the plaintiffs.

From the above decree the defendants appealed, on the grounds (1) that the court was in error in holding that

the plaintiffs were the legal representatives of Yesubái; (2) that it was against the weight of evidence to hold that the assignments were not executed by Yesubái, and were not valid and binding; (3) that the court was in error in holding that Yesubái was married to Mukund Dámodhar by the A'sura, and not by the Bráhma form of marriage; (4) that the court was in error in holding that the plaintiff Lakshuman Bábáji was the legally adopted son of Sávitribái.

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The appeal was argued before WESTROPP, C. J., and West, J., on the 28th, 29th, and 30th of September 1871.

The Honorable A. R. Scoble (Acting Advocate General) and *Starling*, for the appellants :—The first question is as to the validity of the adoption of Lakshuman by Sávitribái. We contend that it is invalid. The evidence shows that it took place more than twenty years after the death of Bábá, Sávitribái's husband. Yeshvadá, the natural mother of Lakshuman, was not herself present at the ceremony; she was then sick, and executed a consent-paper addressed to Sávitribái, dated January 4th, 1864, which ran as follows :—"You have no male child born of your womb: consequently, my deceased husband, Ganu, determined to place in your lap my son Lakshuman, who is about nine years of age. My husband died in the month of Kártik in the same year, before the boy was placed in your lap, and his promise to you remained unfulfilled. Consequently, of my free will and accord I have placed the above-mentioned boy, Lakshuman, in your lap. Now neither I nor the heirs of my estate, and kinsfolk, have any connection whatsoever with the said boy." This document Yeshvadá gave to her uncle, who took the boy to Sávitri's house, where the adoption ceremonies are said to have been performed, but the essential part of the adoption—the *giving* of the boy by his natural to his adoptive parent—could not have taken place, as the natural parent was not present. The giving and receiving in adoption cannot be dispensed with: Vyavahára Mayúkha, Ch. IV., Sec. V., pl. 1, 8, 37, 40, and 41; Mitákshará, Ch. I., Sec. XI., pl. 9; Norton's Leading Cases, Part I., pp. 62, 63, and 64. In the

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 it was held that the execution of deeds without the giving
 and receiving was insufficient. See too *Siddesory Dossee*
v. Doorga Churn Sett (b). The Hindú authorities in force in
 the Eastern schools are to the same effect: Colebrooke's Di-
 gest, Bk. V., Ch. IV., Sec. 8. The conclusion to be derived
 from all the authorities is that the giver must be present,
 otherwise the adoption is invalid.

The next question (assuming the adoption of the plaintiff Lakshuman to be valid) is, What was the nature of this property in the hands of Yesubái? was it *strídhán* or not? If it was not *strídhán*, the plaintiffs, who are by adoption the maternal uncle and aunt by marriage of Yesubái, cannot claim it until her father's line is exhausted. We contend that it was not *strídhán*, and that nothing inherited is *strídhán*. *Bhugwandeén Doobey v. Myna Bae* (c) shows that property inherited by a woman from her husband is not *strídhán* (p. 513). That case was decided according to Benáres law, where the *Mitákshará* is of authority. On reference to Manu, we find he reckons as *strídhán* only things given in some form or other to a woman: Ch. IX., Sl. 194, 195. The *Dáyabhága* is to the same effect: Ch. IV., Sec. I., pl. 1, 7, and 10. So the *Dáyakrama Sangraha*, Ch. II., S. 2, pl. 12, says that heritable wealth does not form a woman's peculiar property.

The only authority to the contrary is the passage in the *Mitákshará*. This is apparently founded upon a misconception of the authority upon which the author is commenting—*Miták.*, Ch. II., Sec. XI., pl. 1, 2, and 5. Even that passage is ambiguous, as remarked in the above-cited case by the Lords of the Privy Council. The case of *Sengamalathammal v. Valaynda Mudali* (d) broadly lays down the proposition that property acquired by a woman by inheritance is not to be classed as her *strídhán*. [WESTROPP, C. J., referred to the *Viramitrodáya* as in accordance with the *Mitákshará* on this

(a) 2 Beng. L. Rep., A. J. 279. (b) 2 Ind. Jur., N. S., 22.

(c) 11 Moo. Ind. App. 487, 505, and 512.

(d) 3 Mad. H. C. Rep. 312, 315.

point.] Property inherited by a mother from her son is not *stridhan*: *P. Bachiraju v. V. Venkatappaadu* (e). To hold that property descending to a woman is *stridhan* would be contrary to the principle laid down in *Srinath Gangopadhya v. Sarbamanigala Debi* (f), which decides that *stridhan* which has once devolved by succession loses its character of *stridhan*. The same mode of devolution which takes away the character of *stridhan* cannot give it that property: see Macnaghten, H. L., p. 38, and W. & B., H. L. II., 104. Mr. Norton, in his Leading Cases, Vol. I., p. 23, adopts the view taken by the Madras Court, and his conclusion is supported by the decision of the Privy Council in *Mussumat Thakoor v. Rai Baluk Ram* (g).

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This question cannot be considered to have been decided in Bombay. The case of *Jamiyatrám v. Bái Jamná* (h) has been overruled in *Lakshmibái v. Ganpat Morobá* (i), and is inconsistent with the decision in *Bhugwandeén Doobey v. Mayna Bae* (j). The case of *Navalrám A'tmárám v. Nandkishor* (k) was decided in accordance with a special custom. *Bháskar Trimbak A'cháryá v. Mahádev Rámji* (l) was only the decision of a single Judge, and is not of much authority. The *Mayúkha* does not specially deal with property inherited by a woman: Ch. IV., Sec. X., pl. 1-5.

Although we contend that Yesubái's property was not her *stridhan*, yet it is not necessary for us to go so far, for if property acquired by a woman by inheritance is to be classed as her *stridhan*, it is not her *stridhan* technically so called, but falls under the larger head treated of by Nilkantha as woman's property, and in that case would, according to the doctrine of the *Mayúkha*, devolve upon Yesubái's paternal, in preference to her maternal kinsmen: *Vyavahára Mayúkha*, Ch. IV., Sec. X., pl. 24, 26. The latter section is explained in West and Bühler's Digest, Part I., p. 214.

(e) 2 *Ibid.*, 402, 405.

(f) 2 Beng. L. Rep., A. J. 144. (g) 11 Moo. Ind. App. 139.

(h) 2 Bom. H. C. Rep. 11.

(i) 4 Bom. H. C. Rep., O. C. J. 113; 5 *Ibid.* 128.

(j) 11 Moo. Ind. App. 487, 505, 512. (k) 1 Bom. H. C. Rep. 20.

(l) 6 Bom. H. C. Rep., O. C. J. 1.

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Under the Dáyabhága law the result would be the same: Ch. XI., Sec. I., pl. 58; Sec. II., pl. 30; and Sec. III.; and also under the law as laid down in the Dáyakrama Sangraha, Ch. I., Sec. III., pl. 3. The Hindú writers on the different sides of India arrive at the same result, but in a different manner. They also cited Vyavahára Mayúkha, Ch. IV., Sec. VIII., pl. 16 and 19.

Even though the property be held to be *strídhan*, the plaintiff cannot succeed if the evidence, as we contend, shows that Yesubái was married according to the Bráhma, and not the A'sura form of marriage. The latter is one of the unapproved forms: Manu, Ch. III., Sl. 20, 25, 31, 51, and 54; and if there is a doubt the court will presume in favour of the more legitimate form of marriage. They also contended that the lower court was in error in holding upon the evidence that the assignments had not been executed by Yesubái.

Mayhew (with him *Marriott*), for the respondents, contended that Yesubái's property was her *strídhan*, as it had come to her from her father's family. He cited Strange H. L., pp. 30, 31, 129 (ed. 1864); Mayúkha, Ch. IV., Sec. X., pl. 3; Mitákshará, Ch. II., Sec. XI., pl. 2, 3, 4, 8, 9, 10, and 11; West and Bühler, Introduction to Digest, pp. 64, 65; *Devkúvarbái's Case* (m), and *Bháskar Trimbak A'cháryá v. Mahádev Rámji* (n). All the authorities cited on the other side show that this property was Yesubái's, and goes to her heirs. The question is who are her heirs, she having been married according to the A'sura form. The Judge below relied upon Vyav.M., Ch. IV., Sec. X., pl. 28, and Mit., Ch. II., Sec. XI., pl. 10 and 11, as showing that the husband's heirs should in such a case only be considered when the property has come through the husband. When the contrary is the case, the parents come before the husband, and the husband and his brothers come in only when the parents' line is exhausted. We contend that the mother's line must be exhausted before the father's line comes in: Miták., Ch. II., Sec. XI.,

(m) 1 Bom. H. C. Rep. 130. (n) 6 *Ibid.*, O. C. J. 1.

pl. 8, 10, and 11. [WESTROPP, C. J., referred to Miták., Ch. II., Sec. IV., note 5.] The Mayúkha indicates Lakshmi (the maternal uncle's wife of Yesubái) as the proper heir of her *stridhan* : Ch. IV., Sec. X., pl. 29, 30. He also referred to Dáyakrama Sangraha, Ch. II., Sec. VI., pl. 9; the Dáyabhága, Ch. IV., Sec. III., pl. 6; *Vináyak Anandráv v. Lakshmibái* (o), and Strange's Manual of Hindú Law, p. 75; West and Bühler's Digest, Part II., p. 95.

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Starling replied.

Cur. adv. vult.

WEST, J.:—The original plaintiff in this case, Yesu, widow of Mukund, sought to recover possession of two houses at Colábá. The defendant, Vijiárangam, set up a conveyance to him by the defendant, Dámodhar, who in his turn relied upon an assignment to him alleged to have been made by Yesu of her whole interest in the property. Yesu having died, an application was made for the substitution, as plaintiffs, of one Lakshuman, alleged to have been adopted by her maternal grandmother, Sávitribái, and of Lakshuman's wife, Lakshmi. This application was admitted, subject to such objections as might be taken at the trial. The question of the representative capacity of the substituted plaintiffs, or of either of them, thus became the first issue for decision in disposing of the case. Subsidiary to this were the issues of whether Lakshuman had been legally adopted by Sávitribái, and of whether Yesubái, the original plaintiff, had been married to Mukund by the Bráhma form of marriage, or, if not, by what other form, that might affect the devolution of her estate upon her death. The learned Judge, Mr. Justice Bayley, who tried the case, found that the adoption was proved in fact and was valid in law; that the marriage of Yesubái to Mukund had been celebrated according to the A'sura, not according to the Bráhma rite; and that in these circumstances the plaintiffs were her legal representatives for the purposes of the suit. Then finding that the alleged assignment by Yesu to Dámodhar was not

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proved, he awarded possession of the property to the plaintiffs, subject only to a lien in Dámodhar's favour for sums properly expended by him, and directed that Dámodhar's conveyance to Vijiárangam should be delivered up to be cancelled. An account of mesne profits was ordered as against each of the two defendants.

Against this decree the defendants now appeal, on the grounds substantially (1) that the assignment by Yesubái is proved by the evidence to be a genuine document ; (2) that as such it is valid and binding ; (3) that the evidence proves a marriage between Mukund and Yesubái according to the Bráhma form of marriage, not according to the A'sura form; and (4) that the plaintiffs, Lakshuman and Lakshmi, are not the legal representatives of the deceased Yesubái. This is not the order in which the objections to the decree are presented in the appeal, but it will be the most convenient one for the disposal of the several questions that arise in the cause. And first we must state our entire concurrence in the view taken by the learned Judge of the alleged assignment by Yesubái to Dámodhar and Thamábái, dated the 21st of September 1860. The account given by Dámodhar himself of the circumstances under which he obtained this assignment, its relation in point of date to the documents of the 25th of September and the 5th of October following, the discrepancies in the statements of the witnesses called to sustain it, and the admittedly tainted character of the chief of these witnesses, Vináyak Sakhárám Dabir, the writer of the document, satisfy us that the balance of probability is greatly against its genuineness. The document of the 5th of October 1860 is of the same character. The learned Judge has pronounced it null and void as against Yesubái, without distinctly stating whether on a ground of fact or of law ; but the appeal assumes that the finding was that the document had not been executed by Yesubái, and we think that the proof of it fails. Its writer was the same Vináyak Sakhárám Dabir who wrote the pretended assignment of the 21st of September. He admits that " Mádhavráv Vináyak, attesting witness of the document, is in jail under sentence to seven years (imprisonment).

sonment) for dacoity." These facts are not calculated to strengthen the credit of a document subject on other grounds to grave suspicion. The principal documents relied on for the defence being thus unproved, the question of their validity requires no discussion.

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On the third point also we agree with the learned Judge. The witness Dhondu Sadu Pilankar, who is, like Yesu and her husband, Mukund, a Bhandári, and is a *mukádam* of the caste, says : "The Bhandáris use the A'sura form of marriage ; I never heard of any Bhandári being married according to the Bráhma form ;" and he adds : "We receive *dez* (*i. e.*, money for the bride), and that form is called the A'sura form." Kṛishṇa Náráyaṇ deposes that amongst the members of the caste this *dez* "is always paid." He himself paid Rs. 100 for a wife for his son. Similar testimony is given by Yeshvadá, the mother of the plaintiff Lakshuman. She may be regarded as an interested witness ; and Kṛishṇa Náráyaṇ, to some extent, perhaps, as prejudiced in favour of the plaintiffs, whose cause he is maintaining ; but Bháu Govind deposes to the same effect. He asserts both the general practice, and a compliance with it in the case of Yesu's marriage to Mukund, at which he was present, and at which Rs. 75 were paid to Yesu's nearest male relative by Mukund's father. So too Náráyaṇ Bháuji Naik, a witness called for the defendant, admits both that money may have been paid as "*dez*" on the occasion of his own second marriage, and that he was present when the caste agreed that Rs. 60 should be the sum to be paid as "*dez*" by the poorer members in future. Bábabá Abbá, another witness on the same side, says that "*dez*" is usually paid if the father of the bride be poor, and that he himself paid, as "*dez*" for his brother's bride, a sum of Rs. 50. On the other hand, the defendant, Dámodhar, who is Mukund's father, says that he paid nothing by way of "*dez*" for Yesu on her marriage to his son. He is supported by the witness Náráyaṇ Bápuji, who was present and saw no money paid. He adds that the giving of "*dez*" is not a custom of the caste. Yet he admits that amongst the poorer members of the caste "*dez*"

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is given, and his testimony to the alleged assignment of the 21st of September 1860 is calculated to raise a suspicion as to the sincerity of his statements. Keshav Vásudev, another Bhandári, denies the existence of the custom; and Sadáshiv Purshotam Joshi, the family priest of the defendant Dámodhar, deposes that he actually officiated as priest at the marriage of Mukund and Yesu, which, he declares, was celebrated according to the Bráhma form. But as to this last point he admits that he does not know the difference between the Bráhma and the A'sura forms of marriage.

24/2/19
 Manu (Ch. III., Sec. 20 *et seq.*), after enumerating the eight recognised forms of marriage, says (24): "Some consider the four first only as approved in the case of a priest (Brahman); one, that of Rákshashas, as peculiar to a soldier; and that of A'suras to a mercantile and a servile man (S'údrá)."

In the next paragraph he pronounces a moral condemnation on the A'sura form; yet in para. 31 he recognises it as prevailing in practice, and describes it thus (para. 31):—"When the bridegroom, having given as much wealth as he can afford to the father and paternal kinsmen and to the damsel herself, takes her voluntarily as his bride, that marriage is named A'sura;" while "The gift of a daughter clothed only with a single robe to a man learned in the Veda, whom her father voluntarily invites and respectfully receives, is the nuptial rite called Bráhma" (para. 27).

Yájñavalkya (Bk. I., Sl. 58-61) quoted at Colebrooke's Digest, Bk. V., Text 499, draws a similar distinction: "An A'sura marriage is contracted by receiving property from the bridegroom," and is permitted (or peculiar) to mercantile and servile men (Vaisyas and S'údrás). So also A'pastamba, Pr. II., Pat. 5, Kan. 12.

The different forms of marriage recognised by the Hindú law are probably to be traced historically to the customs of different tribes which afterwards coalesced to form a single community. The very name of the A'sura form indicates it as one derived from the aboriginal inhabitants of this country,

er those occupying it before the A'ryan invasion. This would of itself cause the ceremony to be looked on with a degree of loathing by sages of the strict Brahmanical school, however circumstances might compel them to tolerate it for those amongst whom it was an established custom. Manu (III., 51) denounces any father who knows the law and who receives a gratuity, however small, for giving his daughter in marriage; but the custom seems never to have died out amongst the lower castes, if indeed it has not, to some extent, obtained among the Brahmans also. Steele, in his Summary (p. 159), says: "The lower castes. often receive money, on the marriage of their females, called Hoonda, which is the characteristic of the fifth (Usoor) variety, and it is suspected that Brahmuns occasionally, in the present avaricious generation, incur sin on this account." The word "sale" as applied to the giving of a girl in marriage, which occurs in some Smritis, may be held indeed to point to an ancient custom of this kind, prevailing even amongst the twice-born; though A'pastamba (Dharmasutra, Pr. II., Pat. VI., K. 13, Par. 12) carefully explains this away, and prescribes the return of the presents, which, according to the Veda, the bridegroom must make to the bride's father in order to fulfil the law. The custom of a form of sale having been thus extensively diffused, having been preserved amongst the lower castes generally down to our own day, and suiting the general circumstances of a class of people ranking, like the Bhandáris, very low, as a class, in the scale of wealth and refinement, it is very probable that it should still subsist amongst them. And, if the custom of the caste generally, it is not likely that such a custom, so essential to a form of marriage with which the caste are familiar, should be set aside in particular cases, merely because of the more or less comfortable circumstances of the parents of the bride, a point which itself is in this case involved in some doubt. Practices the offspring of caste tradition commonly prevail over the tastes of individuals.

Of the several Shástris called by the plaintiffs and the defendants in this case, all agree that the giving and receiving of money for the bride is the distinctive mark of the

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A'sura form of marriage. Vishnu Parashráṁ, called for the defendants, says, however, that the Bráhma and the A'sura forms are used indiscriminately by all castes. Mahádev Balál, on the same side, says the Bráhma form is the most common amongst all Hindús. Both admit that caste custom prevails over the rules of the Shástras. Appá Náráyaṁ, called for the plaintiffs, says, on the contrary, that the Bráhma form of marriage is now confined to Brahmans ; that the Bhandáris, being S'údrás, " their form of marriage ought to be the A'sura form," and that " it would not be correct, according to religion, for a Brahman priest to marry Bhandáris according to the Bráhma form." In such a conflict of testimony, we are driven to rely in a great measure on the antecedent probabilities of the case. The Bráhma form—a gift of a daughter to a man learned in the Vedas—was obviously not intended or viewed by Manu as appropriate to any class of S'údrás. The text of A'pastamba also (Pr. II., Pat. 5, Kand 12, Par. 17) points clearly the same way. The learned Judge has implicitly found as a fact that in this instance money was paid for the bride by the husband's father. That finding is supported by *à priori* probability, as well as by a great preponderance of testimony, and the payment of money, as is said by all the Shástris, is sufficient to mark the marriage as one in the A'sura form.

The question then next arises of whether, under the circumstances of Yesu having been married to Mukund according to the A'sura ceremony, the plaintiffs are her legal representatives for the purposes of the present suit. Their claim to this position depends in the first place on the fact and the validity of the adoption of Lakshuman by Sávitribái. As to the fact of a ceremony intended to be one of adoption having been gone through, there seems to be no room for reasonable doubt. The evidence of Yeshvadábái, Lakshuman's mother, proves that she, in accordance with her deceased husband's promise, gave the boy to Sávitri by a written document. The gift and acceptance in such a case must, as Sir T. Strange (I., 95) has observed, be manifested by some overt act ; and here Yeshvadábái did not in person hand over her son to

Sávitri. But she commissioned her uncle to do this, being at the time too unwell to attend the ceremony herself. The Hindú law recognises the vicarious performance of most legal acts; the object of the corporeal giving and receiving in adoption is obviously to secure due publicity (Colebr. Dig., Bk. V., T. 273, Commentary), and Yeshvadá's employing her uncle to perform this physical act, which derived its efficacy from her own volition accompanying it, cannot, we think, deprive it of its legal effect. We hold, therefore, with the learned Judge, that the adoption is proved and effectual.

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By this adoption Lakshuman has come into the position of brother to the (deceased) mother (Bhágirthi) of Yesubái. Bhágirthi's husband, Bápu, was the adopted son of Viṭhobá, the original owner of the property in dispute, through whose widow, A'kubái, who vainly attempted to dispose of it by will, it descended—the intervening heir, Bápu, and his wife, Bhágirthi, being dead—to Yesubái, their only child. Viṭhobá left a daughter, Thamábái, the wife of the defendant Dámodhar. Their son Mukund, Yesubái's husband, was dead before the descent to her of the property. The question then is, who (she having been married by the A'sura form and having died childless) represents her in estate?

The principal authorities on the Hindú law of this Presidency are the Mitákshará and the Vyavahára Mayúkha. Each of these declares (Miták., Ch. II., Sec. XI., pl. 11; Mayúkha, Ch. IV., Sec. X., pl. 28) that on the death, childless, of a woman married by the A'sura ceremony, the *strídhan* owned by her descends to her mother, her father, and their kindred. Etymologically the word *strídhan*—that is, woman's property—would include property of every kind possessed by a woman. Its second intention or precise comprehension in the Hindú law has been a subject of contention for centuries, and has been determined in the most various ways by the commentators and the courts. In the dim twilight of the early Vedic period, it is possible to discern some indications of a theory of perfect equality once subsisting between the parties to a marriage. These

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indications are not by any means uniform ; but the prevailing notion appears to have been that of a free choice of her husband by the damsel, who was even dowered by her father. The married couple were enjoined to pass their lives in union and content. Yet by the time of the actual composition of the Vedas a text could be introduced, which, according to the interpretation of Baudháyana (Pr. II., Kanda II., 27) and A'pastamba (Aph., Pr. II, Pat. 6., K. 14,) declared that "women are not entitled to use the sacred texts or to inherit." Thus the traces of generous respect were partly lost in the overgrowth of another stage in the national existence; and by the time when the Code of Manu was drawn up, the sex had fallen to a distinctly lower position. A woman is never to seek independence; no religious rite is allowed to her apart from her husband; she must revere him as a god (Manu V., 148, 154, 155). To the same set of doctrines must be assigned such texts as Manu IX., 185, 187, which, taken without the gloss of Kulluka Bhaṭ, exclude wives and daughters from the line of inheritance. S'loka 212 in the same chapter points the same way; but S'loka 217, even if taken in its original form, is at least inconsistent with an entire incapacity for property; and the controverted passage quoted both by Jimutáváhana (Dáyabhága Ch. XI., Sec. I., pl. 7), and by Vijñánes'vara (Miták., Ch. II., Sec. I., pl. 6), in establishing their several theories, says that "a chaste widow shall obtain her husband's entire share" or "entire estate." Women may also tend the sacred fire (Manu II., 67), and take part in the rites prescribed to the husband by the Veda (Manu IX., 96). A'pastamba* lays down the rites proper to a *grihasta* or householder as to be celebrated by him and his wife conjointly: her importance in this respect is recognised in several passages of the Aphorisms. The close connection between the right to perform sacred ceremonies and the capacity for property is familiar to every student of the Hindú law. Brhaspati recognises it in the passage (Colebrooke's Digest, Bk. V., T. 399) in which he declares

* Aphorisms, Pr. II., Pat. I., Kan. I., page 115, of the forthcoming edition by my learned friend Dr. Bühler, to which several other references are made.

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that the wife is half the body of her husband, and in that right takes his property during her widowhood in preference to any other claimant.

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It is thus possible to trace throughout the principal sources of the Hindú law two entirely different, if not inconsistent, lines of thought on the subject of the position and legal capacities of women. In the more modern developments of that law, these opposite views have given rise to directly contrary theories on the subject of woman's property. The widow's right to take her husband's estate or his share having been established, the questions became, under what circumstances did this occur? and what was the nature of her rights? The text of Manu (IX., 194) which defines or enumerates the sixfold property of a woman is immediately followed by one (195) which apparently recognises two kinds of such property not included in the preceding enumeration. The lawyers of the Bengal school, though not without a great many variances of opinion, have resolved that the enumeration of the six kinds is intended by Manu to be exhaustive. This may be seen in Jagannátha's Comments on Text 402 and on Text 465 of Bk. V. of Colebrooke's Digest, while his remarks under Text 477 show the difficulties which this restrictive interpretation involves. Thus the doctrine of a general incapacity, qualified by a special capacity for property of particular kinds, and generally of no great value, forms the groundwork of the whole of the Bengal law of woman's property. It is necessary on this theory to exclude property acquired by inheritance from the class of *strídhan*, though women are allowed to enjoy such property for their lives. The recognised *strídhan* is, by the Bengal lawyers, divided into Yautaka and Ayautaka (Dáyabhága, Ch. IV., Sec. II., pl. 14), and different rules of descent are prescribed for each, which, with the distinction of the two kinds, give occasion to a long and intricate disquisition by Jagannátha in Ch. IX. of Bk. V. of Colebrooke's Digest. As to the descent of each kind the schools of Benáres, of Bengal, and of the South differ. The Mitákshará, which is the chief authority in this Presidency, deals with the whole subject in a quite different and much

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simpler manner. Relying on Yājñavalkya (II., 143) and Gautama (Adhyāya 28, Sl. 18, 21), its author defines *strīdhan*, according to its etymological import, as including every kind of property owned by a woman and obtained by any of the recognised modes of acquisition. Amongst these inheritance is one; and thus, according to the Mitāksharā doctrine, the property in this case must rank as *strīdhan*. Vijñānes'vara contends strongly against the limitation of *strīdhan* to the six kinds specified in the text of Manu, and in this he is supported by the Vīramitrodaya, by the Vivāda Chintāmaṇi, which says (Translation, p. 256): "Six kinds of property means that there cannot be a less number," implying that there may be a greater, and by the Smṛiti Chandrikā, Ch. IX., Sec. I., pl. 3, which says: "It is not to be taken as a restriction of a greater number, but as a denial of a less." The Vyavahāra Mayūkha (Ch. IV., Sec. X., 2) also denies the restriction. Thus there is a great mass of authority, in all the schools except that of Bengal, supporting Vijñānes'vara to this extent at least, that *strīdhan* includes other property besides the six kinds specified by Manu, while Nilkanṭha, the author of the Mayūkha, the next weightiest authority in this Presidency, fully accepts the doctrine that property inherited by a woman is *strīdhan* (Vyavahāra Mayūkha *loc. cit.*), though he prescribes a mode of devolution for it different from that laid down in the Mitāksharā. Inherited property, Nilkanṭha says, though it is *strīdhan*, not being one of those kinds of *strīdhan* for which express texts prescribe exceptional modes of descent, goes, on the woman's death, to her sons and the rest, as if she were a male, and this too notwithstanding her having left daughters (Vyav. May., Ch. IV., Sec. X., pl. 26). The passage which sets forth this doctrine being somewhat obscure in Mr. Borradaile's translation, it may be as well to say that its true purport is this: "It is clear that although there be daughters, the sons or other heirs still succeed to the mother's estate, so far as it is distinct from the part already described (as subject to peculiar devolution under texts applicable to particular species of *strīdhan*)." According to this law of *strīdhan*, the property inherited by Yesu would, in the absence of

descendants, go to her parents, just as if she had been their only son, and, failing them, to the paternal grandmother and the *sapindás* of the father, the *gotrajas* taking precedence of the *bhinnagotras*. Nilkantha's view of what constitutes a *gotraja sapindá* is shown by the Vyavahára Mayúkha, Ch. IV., Sec. VIII., 19. He regards this relationship as constituted by birth in the family, and for this reason assigns to a man's sister the first place amongst his *sapindás*. Thamábái, therefore, the adoptive sister of Yesu's father, Bápu, ranks, according to this authority, amongst the *gotrajas*, as having been born in the family of Yesubái. So long as she exists, the inheritance of relatives to Yesu through her mother, Bhágirthi, and her maternal grandfather, is barred. Lakshuman ranks as Yesubái's maternal uncle. His rank even as one of the *bandhus* might, according to some decisions, be controverted, but does not admit of serious dispute when the enumeration given in the Mitákshará and the Mayúkha is read by the light of the Víramitrodaya. "In the passage of Yogis'vara (Yájñaválkya) also the word 'bandhu' indicates the maternal uncle. Otherwise, if the maternal uncles were not included, there would be a great impropriety, their sons being entitled to inherit, while they themselves, who are more nearly related, would not be entitled" (Víram., f. 209, p. 2, l. 6). The same view of the capacity of such relatives as maternal uncles is taken by the Smṛiti Chandriká, though that work propounds a different doctrine as to their place in the line of succession (Smṛ. Chan. C. XI., Sec. 5, pl. 14, 15). It must be admitted, then, that the maternal uncle is not excluded from the line of heirs; but he comes in after the *sapindás*, *ex parte paterná*, amongst whom, as we have seen in this case, Thamábái is included.

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The law of devolution provided by the Mitákshará is different from that laid down in the Mayúkha. Having swept away the subtilties of the Bengal school as to the comprehension of the term "*strídhán*," Vijñānes'vara lays down the simple rule of succession in the case of a childless woman, that if she was married according to one of the approved rites, the property descends to her husband and

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his *sapindás*; if according to a disapproved rite, as the A'sura, to her parents and their next of kin (Miták., Ch. II., Sec. XI., pl. 11). No express provision is made for the succession of the mother's blood relations; and though this silence does not altogether exclude them from the line of inheritance, yet, according to the ordinary principle of interpretation applicable to the Hindú law referred to at Vyav. May., Ch. IV., Sec. VIII., 18, it postpones them to the heirs expressly mentioned. The doctrine is not peculiar to any one school. It is recognised, for instance, by the Smṛiti Chandriká. (See Ch. XI., pl. 10 *et seq.*) The "next of kin" mentioned at the end of the passage to which we have just referred in the Mitákshará means primarily the father's next of kin. According to Vijñānes'vara's theory, a woman, being by her marriage born again in her husband's family, becomes a *sapindá* of all her husband's *sapindás*, and loses her intimate connexion with her father's family until the extinction of that of her husband. "Sapindá relationship," he says (A'chára Kāṇḍa, f. 6, p. 1, l. 15 *et seq.*), "arises between two people through their being connected by particles of one body. * * * The wife and the husband (are sapindá relations), because they together beget one body (the son). In like manner, brothers' wives also (are sapindá relations to each other), because they (severally) produce a body (by union) with those who have sprung from one body," &c., &c. It is clear, therefore, that he regards the wife of a descendant as holding *sapindá* relationship like her husband to another descendant as far as six degrees from a common ancestor. (*Ibid.*, f. 7, p. 1, l. 7). The Vírāmitrodaya (f. 219, p. 1, l. 3) on the subject of inheritance to *strīdhan* in ordinary cases says: "On failure of [the husband], the succession devolves on the husband's nearest *sapindás*," which rule would apply even if Bhágirthi, having survived to inherit from her daughter Yesubái, had died in possession of the estate. The Dharmasindhu III., Uttarárdha, f. 6, p. 1, l. 10, prescribes that a woman's funeral rites are to be performed by the husband's brother and nephew, if they exist, in preference to her own father. It is indeed on this very principle that the rule of "*niyoga*," or appointment to raise up seed, was

rested by the earliest sages, and though A'pastamba (Pr. II., Pat. X., K. XXVII., 2 *et seq.*) repudiates the rule itself, he implicitly recognises the principle from which it was, as he thinks, improperly deduced. So also Manu, Ch. IX., Sl. 57-68.

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When, therefore, we say that the next of kin, *i.e.*, the *sapindās* of Bhágirthi and her husband, Bápu, are Yesubái's heirs, that means in the first instance Bápu's blood relations, not Bhágirthi's. That such a line of succession is conformable to the general rule of the Hindú law is evident, if indeed further demonstration be necessary, from what is said by Bálam Bhaṭṭa in the remark under Mitákshará, Ch. II., Sec. IV., pl. 5, that "amongst the more distant kindred the paternal line has invariably the preference before the maternal." Now Thamábái being descended from a common ancestor (Viṭhobá) with Bápu, is, according to Vijñanes'vará's doctrine, a *sapindá*, though, on account of her marriage, not a *gotraja sapindá* to him. As such she must inherit before Bhágirthibái's blood relations, who only come in when her husband's line is exhausted. This would be so even if the property had been that of Bhágirthi herself, and the rule is conclusive against the plaintiff's representative character in this suit while Thamábái is in existence.

This examination of the doctrine of the Mitákshará on the subject of *stridhan*—detailed, and even tedious, as it has been—was in a manner forced on us by the confusion that has prevailed on this important subject. Even the professional exponents of the Hindú law, the Shástris of the courts, have in most instances obtained but a glimpse of the true theory, and have then immediately lost sight of it.* The investigation we have made might be sufficient for the disposal, on the text itself, of the case now before us. But for the correct appreciation of the cases that have been cited in argument, it will be necessary to pursue this investigation somewhat further. We have seen that Vijñanes'vara includes all property inherited by a woman in her *stridhan*. In the same chapter (Miták., Ch. II., Sec. I., pl. 39) he had

* See the answers in West and Bühler's Digest, I., 239-242.

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previously arrived, through an elaborate course of argument at the conclusion that a widow takes the whole estate of her deceased husband separated in interest from his brethren. This doctrine, therefore, must have been fully present to his mind when he developed his theory of *strīdhan* in Sec. XI. He makes no distinction between the inheritance of a woman from her husband and her inheritance from any other person. The right which he thus confers on her is balanced by a corresponding right which he allows to the husband and his *sapindās*. That inheritance from a member of her own family, which on a woman's death would, according to the Bengal school, revert to the next heirs of him from whom she inherited (Colebrooke's Dig., Bk. V., T. 399, 477), and which, according to the Vyavahāra Mayūkha, would go to her heirs as though she had been a male, is assigned by Vijñānes'vara (Mitāk., Ch. II., Sec. XI., pl. 9, 12, 25) to her daughters, her sons, and after them to her husband and his *sapindās*. The two rules spring from the same source—a higher conception of a woman's capacity for property, and of her complete identification by marriage with her husband's family, than the Bengal lawyers would entertain; while the limiting of the widow's rights as an heir to the case of her husband's having been separated in interest from his brethren, harmonises more with the Hindú theory of the united family than the opposite doctrine of her taking his share equally, whether the family have been divided or not.

Vijñānes'vara, like all the Hindú lawyers, denounces the appropriation of a woman's property by her husband, except in cases of great pressure, and by the other kinsmen under any circumstances (Mitāk., Ch. II., Sec. XI., pl. 32, 33). But he lays down no rule as to the extent of the woman's own power over the property. The natural conclusion would seem to be that he considered this already sufficiently provided for as to his immediate subject, inheritance, by other lawyers, and by the analogies to be drawn from his rules as to the estate of a male proprietor. Now in Ch. I., Sec. I., pl. 27, 28, it is laid down that a man is "subject to

the control of his sons and the rest (of those interested) in regard to the immoveable estate, whether acquired by himself or inherited," though he may make a gift or sale of it for the relief of family necessities or for pious purposes.* It is clear, therefore, that a right of absolute disposal did not enter into Vijñānes'vara's conception of the essentials of ownership. He admits (Mitāk., Ch. II., Sec. I., pl. 25) the genuineness and the authority of the text of Nārada, which, with so many others, proclaims the dependence of women, which he says does not disqualify them for proprietorship. He allows a husband, as we have seen, in some cases to dispose of his wife's property. The inference to be gathered from these passages is strengthened if we look into his chief authorities. Manu allows women no independence. The verse denying it occurs in Yājñavalkya also (Ch. I.). Kātyāyana so frequently quoted in the Mitāksharā, says that the widow is to enjoy the estate frugally till she die, and after her the heirs (Colebrooke's Digest, Bk. V., T. 477), consistently with that passage of the Mahābhārata (T. 402) which limits the widow to simple enjoyment. Jagannātha (T. 402), referring to texts 476 and 477, observes that as a woman is not allowed to make away with immoveable property given to her by her husband, much less can she dispose at her will of such property inherited from him. Even Brhaspati, who, as we have seen, insists emphatically on a widow's right of inheritance, is equally emphatic in restraining her power of dealing with it (Vyav. M., Ch. IV., Sec. VIII., pl. 3). His somewhat ambiguous expression cannot at any rate mean less than this. It seems a reasonable inference from these and other authorities that, as to immoveable property at any rate—and with immoveable property, according to the Hindú law, is classed every kind of property producing a periodical income—the woman's ownership is subject

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* If he reserve enough for the support of the family, however, the father is allowed to deal free from interference with what he has himself acquired. Such is the effect of the passage referred to when taken with Ch. I., Sec. V., pl. 10, unless the latter is to be referred—as perhaps on correct principles of interpretation, it ought to be referred—solely to moveable property. •

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to the control of her husband, and of the other persons interested in the preservation of the estate, and that it cannot be needlessly dissipated at her mere caprice. Kátyáyana, indeed, as quoted by Nilkantha (Vyav. May., Ch. IV., Sec. VIII., pl. 4), says expressly "she has not property therein to the extent of gift, mortgage, or sale," except, as Nilkantha adds, for appropriate purposes. A widow may dispose as she pleases of property as to which this power is expressly conferred, but to recognise inherited property as part of her *strídhān* by no means involves the consequence that she can alien it without good reason. The argument in support of this consequence put forward by Jagannátha in his comments on Colebrooke's Digest, Bk. V., T. 399,* involves a very obvious fallacy.

Now the law of the Mitákshará applicable to this case being such as I have described, what is the bearing upon it of the principal cases that have been cited in argument? In the case of *Jamiyatrám v. Báí Jamná* (a) Sir Joseph Arnould says: "The Mitákshará, Ch. II., Sec. II., Cl. 2, undoubtedly classes 'property acquired by inheritance' under the widow's *strídhān*, but (as pointed out in *Devkúvarbái's Case*) cl. 4 of the same chapter and section conclusively shows that the words 'property acquired by inheritance,' as used in cl. 2, relate only to what has 'been received by the widow from her brother, her mother, or her father,' i.e., from her own family." On referring to the report of *Devkúvarbái's Case* (b) we have not been able to discover any such construction of the passages in the Mitákshará as that relied on by the learned Judge. Sir M. Sausse does, however, say (p. 133): "In regard to immoveable property [a widow's] estate is in the nature of that of a tenant for life;" and following this, Sir J. Arnould says: "When a separated Hindú dies leaving landed property and no sons, or sons' sons, his widow on his death takes for her life; and the daughters, subject to the widow's life-estate take an estate in remainder, vested immediately in interest, but not coming into the possession of themselves or their

* Vol. II., p. 527, of the Madras edn.

(a) 2 Bom. H. C. Rep. 11. (b) 1 Bom. H. C. Rep. 130.

sons, as the case may be, until after the death of the widow." Immediately afterwards the learned Judge quotes from Sir T. Strange a doctrine as to the right of inheritance in such cases which that author sets forth as the Bengal law in contrast with that of the Mitákshará (1 Strange, H. L. 248). In a somewhat similar case, *The Collector of Masulipatam v. Cavalry Vencata Narayanappa* (c), their Lordships of the Judicial Committee remarked: "It was justly observed in the course of the argument, with reference to those authorities which speak of the widow's interest as a life-estate, that great confusion arises from applying analogies derived from the English law of real property to the Hindu law of inheritance; and that when so applied the terms by which we describe estates in land under the English law are more likely to mislead than to direct the judgment aright."

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"It is clear that under the Hindu law, the widow, though she takes as heir, takes a special and qualified estate. Compared with any estate that passes under the English law by inheritance, it is an anomalous estate. It is a qualified proprietorship, and it is only by the principles of the Hindu law that the extent and nature of the qualification can be determined." The same question has lately been very fully gone into in this court in the cases of *Lálchand* and of *Ghelá Pemá* against *Gumtibái* (d), in which the same view of the nature of a widow's estate has been taken.

In the case of *Lakshmibái v. Morobá* (e) the case of *Jamiyatrám v. Báí Jumná* was directly overruled, and in *Bháskar Trimbak A'charya v. Mahádev Rámji* (f), the learned Judge (p. 14) distinctly, though not in terms, abandons the view taken by him in the earlier case. It cannot, therefore, be considered as of any authority.

In the case of *Navalrám A'tmárám v. Nandkishor Náráyan* (f) it was laid down (p. 216) "that property inherited by a married woman from her father, whether or not it be

(c) 8 Moo. Ind. App. 550.

(d) 8 Bom. H. C. Rep., O. C. J. 140.

(e) 4 Bom. H. C. Rep., O. C. J. 163; 5 *Ibid.* 139.

(f) 6 Bom. H. C. Rep., O. C. J. 1. (f) 1 Bom. H. C. Rep. 210.

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strictly entitled to the name of *strídhan*, descends on her death to her own, and not to her father's heirs :” that is, it descends like *strídhan*, or, as it is put in the head-note, “class-
 es as *strídhan* and descends accordingly.” In the case of *Bháskar v. Mahádev*, already cited, Sir J. Arnould says (p. 18) : “Lakshmi taking by inheritance from her brother would take his estate as woman's property.” In the same case the learned Judge expresses an opinion (p. 17) that the only exception to the rule that a woman's inherited property is *strídhan*, arises in the case of property inherited from her husband. In *Narsáppú v. Sakhárám (g)*, Gibbs, J., on the other hand, says (p. 218) that “the rule under which the widow succeeds to her son's separated property is the same under which she succeeds to her husband's in a divided family.” If a son's property inherited by his mother is subject to limitations that deprive it in her hands of the character of *strídhan*, much more should this be the case with property so taken by the more distant paternal grandmother. Yet in the latter case it is assumed by both Vis'ves'vara and Lakshmídevi in their commentaries that the estate of course becomes *strídhan* (Miták., Ch. II., Sec. IV., pl. 2, second note). Thus while the parallel drawn by our learned brother Gibbs between property inherited from a husband and from a son is perfectly correct, it is so only on this condition, always to be remembered, that the Mitákshará ranks property inherited from a husband as *strúlhan*. The position is confirmed by this very comparison. The Mayúkha places the sister at the head of the *sapindás* ; the Mitákshará provides expressly for inheritance from a husband and from a son ; but in neither is any hint to be found that the interest in property thus taken differs in any way from that in property inherited from other relations. The doctrines of the two works, though different on some points, are entirely self-consistent. So, too, in a manner are the doctrines of the Bengal school, though not without some exceptions. But a general right to take inherited property as *strídhan*, qualified as to property descending from a husband or a son by rights

deduced from the Bengal law, is consistent with neither the one system nor the other.

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Of the Madras cases that of *Kullammál v. Kuppu Pillai* (h) lays down that a Hindú wife or widow may alienate her *strídhan*, whether it be moveable or immoveable, except perhaps land given to her by her husband. The judgment of Sir C. Scotland, C. J., admits that property inherited from a husband is subject to restrictions on alienation. The *Mitákshará*, as we have seen, blends such property with the other *strídhan*. If then the one portion is subject to a restriction, so also is the rest, which is in fact substantially the result I have already arrived at with respect to such property classed as immoveable. In *Bachiraju v. Venkatapadu* (i) it was ruled that a mother inheriting from a son has not an absolute property in the estate, but merely a life-interest without power of alienation. In what sense this rule must be taken we have already endeavoured to show. At page 403 the learned Judges (Frere and Innes) say that the effect of the *Mitákshará* doctrine is "of course to give [a woman] absolute property in it (an estate devolving by inheritance), and to change the line of descent." If by "absolute" we are here to understand "free from all restraints on disposal," no such consequence as "absolute property" according to our view can be said necessarily to follow, in this Presidency at any rate, from the premises. The authority of the *Mayúkhá* fortifying the *Mitákshará* is too strongly against it, and while it establishes a complete property, at the same time prevents capricious dealing with the estate. At page 405, again, the learned Judges ground themselves upon *Vijñānes'vara's* omission in Ch. II., Sec. XI., to enlarge upon the proof that inherited property may be *strídhan*, as an argument against the soundness of his theory. But then it must be borne in mind that he had earlier in the same chapter dealt elaborately with the very topic of women's inheritance, especially a widow's inheritance from her husband. To go further into the subject in Sec. XI. would have been quite superfluous. While, therefore, I adopt generally the conclusion

(h) 1 Mad. H. C. Rep. 85. (i) 2 Mad. H. C. Rep. 402.

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arrived at in this case, I do not regard myself as bound by all the dicta thrown out in the course of the judgment.

In *Sengamalathammal v. Valaynda Mudali* (j) it was ruled broadly that property acquired by a woman by inheritance is not to be classed as *strīdhan*. We have seen how in this Presidency the doctrine, thus logically carried out to its proper consequences, has yet had to be gradually abandoned, in consequence of the recurring difficulties occasioned by its real inconsistency with Vijñānes'vara's consistent theory. In this judgment the learned Judges (Sir A. Bittleston, C. J., and Ellis, J.) suggest a fresh interpretation of the doctrine of the Mitāksharā, grounded on a comparison of it with a passage in the Smṛiti Chandrikā. This interpretation is that "though in the Mitāksharā, property acquired by inheritance is in general terms classed with the other description of woman's separate property, no more is meant than that *some* property acquired by women by inheritance will follow the rule of descent applicable to *strīdhan*, though not falling strictly under any of the descriptions of such property" (p. 314). If the term "some" is to be thus applied to inherited property, it may with equal reason be attached to any other term in Vijñānes'vara's enumeration. His whole argument is to our minds convincing proof that he did not intend the ordinary sense of the words to be explained away in any case whatever.

Of the cases in the Judicial Committee of the Privy Council it is necessary to refer only to three. In that already cited, Lord Justice Turner says (p. 551) that, "according to the principles of the Hindoo law, the proper state of every woman is one of tutelage; they always require protection, and are never fit for independence," and "the restrictions on a Hindoo widow's power of alienation are inseparable from her estate." But she is not more dependent than a spinster or a *feme covert*. The condition of tutelage does not prevent any one of them from taking property as *strīdhan*, yet none of the three therefore becomes, except under particular texts, "com-

(j) 3 Mad. H. C. Rep. 312.

pletely emancipated, perfectly uncontrolled in the disposal of her property." The limitations imposed on a widow by law, whatever her moral obligations may be, are less stringent than upon other women; see Jagannátha's comment under Bk. V., T. 477, of Colebrooke's Digest; so that she should, if there be any difference, be more, rather than less, capable than others of taking property absolutely. In *Mussamat Thakur Deyhee v. Rai Balak Ram* (k) it was decided that a widow cannot dispose of immoveable property inherited from her husband. Their Lordships did not find it necessary (p. 175) to determine whether the property was *strídhan* or not. In *Bhagwandeem Doobey v. Myna Bae* (l), their Lordships say: "It is settled beyond all question that the immoveable property which a woman inherits from her husband cannot be disposed of by her, and does not pass as her *strídhan*. The legitimate inference from this seems to be that neither moveable nor immoveable property inherited from her husband forms part of a woman's *peculium* or *strídhan*." The two kinds of property, moveable and immoveable, doubtless fall under the same category, but that is *strídhan*. The restrictions on their alienation do not, as we have seen, prevent this; and as to the descent of the property, no case has been pointed out to us in which, after the doctrine of the *Mitákshará* had been fairly presented in argument, the devolution which it prescribes was held contrary to the law of this Presidency. If property inherited from a husband is to be excluded from the provision of the *Mitákshará*, then all inherited property must logically follow it: the rule laid down is the same for all; and all those decisions which recognise inherited estates as *strídhan* rest on a false principle. At page 512 their Lordships say: "Both the *Viváda Chintámani* and the *Mayúkha* confine *strídhan* within the definitions of *Manu* and *Kátyáyana*," and exclude from it property inherited by a woman from her husband. We have seen that the *Viváda Chintámani* impliedly recognises more than the six kinds of *strídhan*, and that the *Mayúkha* expressly adopts *Vijñanes'vara's* explanation. Immediately

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(k) 11 Meo. Ind. App. 139.

(l) 11 Moo. Ind. App. 487.

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afterwards their Lordships say : “ Another argument against including the wealth inherited from her husband in a woman's *stridhan*, as defined by the 2nd clause of the 11th section of the 2nd chapter of the Mitákshará, may be derived from the clauses 11 to 25 (both inclusive) of the same section. These declare the husband to be, in default of the issue, the heir to ‘ the whole property as before described, cl. 11.’ This is intelligible if the words ‘ property which she may have acquired by inheritance,’ in the second clause, are considered to be property inherited in her husband's lifetime, or from some persons other than him.” Here the word “ whole” is interpolated from Bálam Bhaṭṭa. The husband is declared the heir “ in the first place,” and provision is made for the succession of his *sapindás*. His mention as a possible heir no more implies that he must necessarily survive his wife than the mention of other possible heirs implies the contrary. If these considerations should be presented to their Lordships in an appeal from this Presidency, it is reasonable to suppose that they would have much weight. Unreservedly accepting their Lordships' determinations as conclusive in all similar cases arising under the same laws, it is not inconsistent with this principle that, without in any way questioning the correctness of the result arrived at in the case under consideration, which indeed for the purposes of the one we have to dispose of may be adopted as it stands, I should not feel bound by the reasoning on which it is founded to the inference that for Hindús in Bombay the doctrine holds good that a husband's property inherited by his widow is not *stridhan*, with the logical consequence, drawn by the Eastern lawyers, that no inherited property is *stridhan*. In that case the Mitákshará provides absolutely no rule for the devolution of the property, which, indeed, is another strong reason for adhering to its inclusive definition, and we must fall back either on the Mayúkha, which is equally inconsistent with a current of decisions derived from the analogies of the Bengal law, or else on the Bengal law itself. But in any of these cases Thamábai, as in the paternal line, and of the family from which the property in dispute descended to Yesubái, is still her representative in relation to

that property. The plaintiffs, Lakshuman and Lakshmi, are by her excluded, and on this ground the decision of the court below should, I think, be reversed.

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WESTROPP, C. J.:—The plaint in the suit was originally filed by Yesubái for the purpose of setting aside certain assignments alleged to have been made by her to the defendant Dámódhar and his wife, Thamábái. Yesubái having died before the suit was heard, an application was made before me to have the present plaintiffs' names substituted for that of Yesubái, and for leave for them to carry on the suit. That application was granted, the question of law and fact, as to whether they represented Yesubái or not, being reserved for consideration at the hearing. The learned Judge has found that Lakshuman and Lakshmi are the representatives of Yesubái. We agree with the learned Judge in his estimate of the evidence, and implicitly accept all the facts as found by him. The question of Hindú law arising from these facts is a difficult one, but looking (as I think we are in this island bound to do) to the Mayúkha, for the law to regulate this case, Thamábái must be regarded as the legal representative of Yesubái in respect of the property in question in this suit, and not the plaintiffs. Having regard to the reprehensible conduct of the principal defendant, Dámódhar, with reference to the alleged assignments by Yesubái, and to the fact that the defendant, Vijiárangam Mudliár, has not shown himself to be an innocent and *bonâ fide* purchaser of the property, we do not think we ought to give the defendant costs as against the plaintiffs. Each party must, therefore, bear their own costs throughout the case.

The decree of the Division Court will be reversed, but without costs.

Decree reversed.

Attorneys for the appellants : *Dallas & Lynch.*

Attorneys for the respondents : *Keir, Prescott, & Winter.*

CASES

DECIDED IN THE

APPELLATE CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

Regular Appeal No. 9 of 1870.

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Jan. 16.

THE COLLECTOR OF RATNA'GIRI' *Appellant.*
VYANKATRA'V NA'RA'YAN SURVE *Respondent.*

*Grant by Government—Right to resume Grant—Abandonment of Rights
by Managing Khot.*

Government cannot, by issuing a subsequent proclamation, resume a grant made by a previous proclamation, inasmuch as it cannot, any more than a private person, without the consent of the donee, revoke a gift actually made.

Held that, in the absence of evidence of custom rendering the act of one sharer in a khotship (which act involved the sacrifice of important rights) binding upon his co-sharers, a managing *khot* has, without the assent of his co-sharers, no power to give up rights which belong to them as well as himself.

THIS was an appeal from the decision of A. Lyon, Acting Judge of Ratnágirí, in Suit No. 5 of 1869.

The plaintiff, Vyankatráv, brought the suit to recover possession of three hundred poles of teak timber, or the value thereof, with interest, alleging that the wood had been cut down by him in his own private and *khoti* lands in his *khoti* village, and had been attached by order of the Collector, the defendant.

The defendant, *inter alia*, pleaded that only one half of the village belonged to the plaintiff as a *khot*, and that the other half belonged to Government; that the plaintiff himself and a mortgagee of a portion of the khotship had agreed

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in certain *kabuláyats* that they would not cut down any trees without the permission of the Government; and that the right to cut timber granted by Mr. Dunlop, by a proclamation dated the 1st of March 1824, had been rescinded by a subsequent Government proclamation of 1851.

Mr. Dunlop's proclamation was as follows:—

H.R. 1871-1872 "Proclamation of the Honorable Company Bahádúr, by J. A. Dunlop, Esq., Collector and Magistrate, Zillá Southern Konkan.

"It is hereby proclaimed, for the information of all, that it has been the practice hitherto for the Government to claim all Teak, Sisur, and other timber trees within the limits of the zillá, even when growing on private lands, on which account people were discouraged from preserving and rearing these timber trees on their lands. The Government having heard this, and bearing in mind that all people will be much benefited by the rearing and cultivation of Teak, Sisur, and other trees in the country, hereby proclaim, for the information of all, that, exclusive of the Government forest in the Sawera táluká and Málvan táluká, whoever may have Teak and other trees growing on their land outside these limits will be exempted from all claims on the part of Government. Those who are the owners of trees, or who will hereafter raise them on their private land, will be allowed to dispose of them according to their pleasure. No obstruction will be caused on the part of Government.

"Dated 1st March 1824."

The subsequent proclamation ran thus:—

"PROCLAMATION

"Regarding Teak and Sissoo in the Collectorate of Ratnágiri.

"1. Be it known that in 1823* Mr. Dunlop, when Collector of the Southern Konkan, put forth a Proclamation wherein he conditionally made over, on behalf of Government, the royalty rights heretofore exercised in regard to Teak and Sissoo trees growing in certain places.

"2. The object of the said Proclamation, as stated in the first paragraph thereof, was the extension of the growth of useful timber.

"3. As, however, from past experience it is clear that the continuance of the permission to cut Teak and Sissoo on such terms throughout the collectorate will speedily lead to the complete annihilation of such useful timber,

"4. The Right Honorable the Governor in Council is pleased to declare that the Proclamation of 1823 is rescinded, and that the Government resumes, in regard to Forest, all the seigniorial rights which it possessed previous to 1823.

"5. At the same time, as it is understood that a few persons, taking advantage of the liberal offer made by Government in 1823, did attend to the Teak and Sissoo timber growing in their own grounds (*Jagih*), Government is prepared to grant full benefit, present and prospective, to such persons, provided they establish, to the satisfaction of the Collector

* *Sic.*

and Conservator of Forests, within six months from the 1st June next, that the wood in their lands has been attended to and nurtured since 1823, such benefit to be contingent on their continuing their care to the trees now in course of growth.

"6. The forest preserves in the *táluká* of Suvarndurga and in the Subhá of Málvan to remain, as at present, exclusively Government preserves, subject to such future orders as Government may see fit to issue in regard to them."

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The Acting Judge laid down the following issues:—

Has the plaintiff a right to cut down teak trees in his private and *khoti* lands in the *khoti* village?

How many trees is he entitled to recover the value of?

In finding the first issue for the plaintiff, the Judge delivered the following judgment:—

"By *khásgi* land is meant a portion of the *khoti nisbat* land cultivated by the *khot* in person, in contradistinction to other land also *khoti nisbat* but sublet to tenants. As regards the right of the *khot* against Government, the interest in regard to each of them is the same. If he has a right to timber in the one case, he has it in the other, as they are both held from Government under the same tenure.

"I consider that he has the right to cut timber in both descriptions of land. The grant of the timber made by Mr. Dunlop's proclamation included a grant to *khots*, as well as to others. Looking to the rules of construing grants from the Crown, and to the strongly expressed object of the Government that the gift was made for the purpose of preserving forests in this country, it may be doubtful whether this expression of the object of Government might not amount to a condition; and that if any grantee should so grossly counteract the wishes of Government as to nearly annihilate the forests in his holding, this might amount to a breach of the condition, authorising the Government to sue to recover the grant. This question, however, does not arise in this case, as it does not appear that the plaintiff has interfered recklessly with the forest in dispute, and, besides, his doing so would not authorise the resumption of the grant at the discretion of Government. This could only be done

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through the courts of law. It will be seen from the foregoing that I am of opinion, and in this opinion I agree with my learned predecessor, Mr. Izon, that the proclamation of 1851 does not destroy any rights acquired by the previous proclamation. I also consider that the *kabuláyats*, both the special ones of the eight-anna sharer and the mortgagee *khot*, as well as the annual general *kabuláyats*, have no effect in taking away rights already in existence.

“As the Government are the owners of half the village, the plaintiff is entitled only to half the wood cut. I, accordingly, decree for the plaintiff for half the wood claimed, or its value, and costs in proportion.”

The appeal was argued before WESTROPP, C.J., and MELVILL, J.

Dhirajlál Mathurádás, Government Pleader, appeared for the appellant, the Collector.

Shántárám Ndráyan appeared for the respondent.

The judgment of the court was delivered by

WESTROPP, C. J. :—In this case it is neither denied that the land on which the timber was grown is situated in a district which is affected by Mr. Dunlop's proclamation, nor that the plaintiff, or those through whom he claims, were in possession of the land at the time of that proclamation. It also appears that the land on which the timber was cut was either “*khásgí*” or “*khoti nisbat*” land in the possession of the plaintiff or his sub-tenants, and of such land at all events he would be the proprietor, and not a mere farmer of the revenue, if that be the true position of the *khot* in respect of ordinary *khoti* lands—an important point which we do not purpose to decide on this occasion.

The defendant seeks to defeat the operation of Mr. Dunlop's proclamation in this case on two grounds:—1st, that the proclamation was rescinded by Government in a subsequent proclamation of 1851; and, 2ndly, that the *khots* of the village have themselves admitted that they have no proprietary right to the timber.

As to the first of these arguments, it is sufficient for us to say that, if there be not any breach of condition by the donee, the Government cannot, any more than a private person, revoke a gift actually made, without the consent of the donee: 14 Vin. Ab., Grants (H. a. 8) 1, 6, 7, 2nd ed., pp. 139, 140; Com. Dig., Grant, F.; 2 Levinz 142; 7 C. & P. 401, 402; 2 Spence Eq. Jur. 881, 882. If the King be deceived in his grant, it will be void: Com. Dig., Grant (G. 8), I. E. & B. 337, 338. But every grant of the King, of a thing which he may grant, where he is apprised of his interest, and of the cause and circumstances of the grant, will be good: Com. Dig., Grant (G. 4); and will bind his successors: *Ibid.* (G. 3). And he may make a simple grant without consideration: Hobart 230; 5 Bac. Ab., Prerogative, F. 2 (5th ed., p. 608, note [e]); 1 Rep. 53 a, b, note. In Mr. Dunlop's proclamation a hope is expressed that the gift may have certain good results; but the happening of such results is in no way one of the conditions of the gift.

As to the second ground of defence, it has not been contended that the plaintiff has himself entered into any agreement or done any act whereby he has waived the benefit of Mr. Dunlop's proclamation. What is relied on is a special *kabulāyat* which was passed in 1855 to Dr. Gibson, the Conservator of Forests, by one of the sharers in the khotship, and by a mortgagee of a portion of it, and in which those persons undertook not to cut any teak or blackwood trees, or permit any one else to do so, but to preserve those trees for Government, in consideration of receiving one-third of all cuttings. We have also been referred to a similar proviso contained in the ordinary *kabulāyat* subsequently passed to the Collector. But Mr. Dhirajlāl admits that he is unable to show that the plaintiff had any notice or knowledge of the proviso in question; nor has he produced any evidence of any custom by which the act of one sharer in a khotship, which involved the sacrifice of important rights, would be binding upon his co-sharers. In the absence of such evidence we cannot hold that a managing *khot* has, without the assent of his co-sharers, power to give up rights

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which belong to them as well as to himself. If there be such a custom, it lay upon the Collector to adduce evidence of it; and as he has failed to do so, and has not shown that the plaintiff has cut more timber than he was entitled to cut, we have no choice but to confirm the Judge's decree. The plaintiff has not appealed against Mr. Lyon's order, disallowing one-half of his claim; and it is not, therefore, necessary for us to express any opinion as to the propriety of that portion of Mr. Lyon's decree.

The case has been very imperfectly put forward on behalf of Government in the court below; and our present decision, which is given under peculiar circumstances, must be held to be limited to the particular case before us, and not to prejudice the right of Government, in any similar case which may hereafter arise, to give evidence on the points upon which, in the present case, Government has failed to shed any light.

S.L.R. 6 Bom. 1874.
S.L.R. 4 Bom. 327.
Jan. 17.

Special Appeal No. 457 of 1870.

S.L.R. 12 Bom. 5. MULCHAND GULA'BCHAND.....Appellant.
S.L.R. 12 Bom. 5. GIRDHAR MA'DHAV *et al.*, sons & heirs of
S.L.R. 8 Bom. 195 MA'DHAV GHELLA', deceasedRespondents.

Limitation—Account stated.

Although to make an account a stated account it is not necessary that it should be signed, yet, unless it is signed by the debtor, the intention and effect of Sec. 4 of Act XIV. of 1859 is to prevent it being made the foundation of an action to recover a debt which would otherwise be barred by that Act.

Where there has been a running account between the plaintiff and the defendant, consisting of advances made by the former, and part-payments by the latter, the plaintiff is entitled to recover only in respect of advances made by him within three years preceding the institution of his suit, but he has a right to appropriate any payments made within that time to the reduction of the general balance, even though the recovery of such balance may be barred by time.

THIS was a special appeal from the decision of E. T. Candy, Acting Assistant Judge at Ahmedábád, in Appeal Suit No. 593 of 1869, confirming the decree of the Subordinate

Judge of Dholká in Original Suit No. 165 of 1869. The appeal was argued before MELVILL and KEMBALL, JJ.

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Nánábhái Haridás for the special appellant.

Nagindás Tulsidás for the special respondent.

The facts sufficiently appear from the following judgment:—

MELVILL, J. :—In this case the appellant has sued to recover from the respondents the amount due on a running account between himself and the deceased respondent, Mádhav Ghellá, which extends over several years.

The account shows a series of advances by the appellant, and part-payments by the deceased respondent, the balance being throughout in favour of the appellant.

Under the law of limitations in force in this country, a part-payment of a debt has ordinarily no effect in taking a case out of the operation of the statute. Unless, therefore, there exist some other special ground for extending the period allowed by the statute, we must hold that the cause of action in regard to each advance arose on the date of such advance, and that those advances only are recoverable which were made within three years immediately preceding the institution of the suit.

It has been argued that such special ground exists in the circumstance that there was a settlement of accounts between the parties at the end of the year Samvat 1923.

The nature of this settlement is very vaguely stated; but, at the most, all that occurred was that a balance was struck in the deceased respondent's presence, and was verbally admitted by him to be correct.

Now, although it is undoubtedly true that in order to make an account a stated account it is not necessary that it should be signed by the parties, yet we think that, unless it is signed by the debtor, the intention and effect of Sec. 4 of Act XIV. of 1859 is to prevent it being made the foundation of an action to recover a debt which would otherwise be

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barred by that Act. An account stated is nothing more than the admission of a debt; and though, for other purposes, it may be immaterial whether the admission has been made by words or in writing, yet the law expressly provides that a time-barred debt shall not be recoverable by virtue of an admission unless such admission has taken the form of an acknowledgment in writing signed by the debtor.

We have been referred to the case of *Umedchand Hukamchand et al. v. Shá Bulákidás Lálchand et al.* (a) as being opposed to the view which we have expressed; but we do not see that it is so. In that case it was held that an account stated involves an implied contract to pay the balance due, and that the period of limitation applicable to such implied contract is six years, and not three years as would be the case if there had been an express contract to pay. This is not the question in the present case. It is immaterial to the appellant whether he be allowed six years or three years from the date of settlement of accounts; in either case his claim would be within the limit. But the question is whether he is to be allowed any extra time at all on account of the settlement of accounts. It has been admitted that if an account stated be regarded merely as an admission of a debt, Sec. 4 of Act XIV. of 1859 prevents the appellant from availing himself of it. But the case set up is that the appellant does not seek to avail himself of the admission as a means of extending the period of limitation applicable to the original debt, but that he claims upon the new contract which arises by implication out of the admission. This argument might be equally well applied to the case of every admission of a debt, of whatever description; and Sec. 4 would be absolutely inoperative. An admission of a debt doubtless implies a promise in law to pay it; but an admission not made in the manner which the law prescribes for the purpose of preventing a debt from becoming barred by time does not at all imply a promise to pay such debt, if it should become barred by time.

(a) 5 Bom. H. C. Rep., O. C J. 16.

We do not, of course, say that in such cases a new period of limitation would not arise if there were a new and distinct contract to pay the sum found to be due on the settlement of accounts. But it would be necessary to prove an express contract of this kind; and it would not be sufficient to infer such a contract, as implied by the debtor's admission of the correctness of the balance.

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We are of opinion that the Assistant Judge was right in holding that the appellant could only recover in respect of the advances made within three years before the institution of the suit. But, on the other hand, we think that he was in error in setting off against these advances all payments made by the deceased respondent during the same three years. These payments were made in reduction of the general balance standing against the deceased respondent on the date of each payment, and the appellant has a right to appropriate them to the reduction of such balance, even though the recovery of the balance due at a particular date may be barred by time. An account must be taken on the principle that the appellant is entitled to recover in respect of all advances made by him between the 29th of January 1866 and the 29th of January 1869, and the respondents are entitled to set off only so much (if any) of the payments made during the same period as may be in excess of the balance standing against the deceased respondent on the 29th of January 1866.

We should have taken this account ourselves if we had been able to dispose of the case; but this we cannot do, as there is a question as to the liability of the different respondents which has not been gone into; and we, therefore, remand the case in order that an account may be taken according to the principle which we have laid down, and that the liability of the different respondents may be determined.

KEMBALL, J., concurred.

MELVILL, J., subsequently added the following observations:—

Since delivering judgment in this case, my attention has

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been directed to the case of *Ashby v. James*, 11 M. & W. 542. In that case it was decided that where A has an account against B, some of the items of which are more than six years old, and B has a cross-account against A, and they meet and go through both accounts, and a balance is struck in A's favour, such settlement of account takes the case out of the statute of limitation. If the judgment in that case is (as Tindal, C. J., held it to be in *Clark v. Alexander*, 8 Scott N. R. 165) best supported on the ground suggested by Alderson, B., "that the going through the account with items on both sides, and striking a balance, converts the *set-off* into *payments*," then it has no application to the case before us, for under Act XIV. of 1859 a part-payment of a debt does not take a case out of the statute, though I am happy to say that, on the recommendation of the Chief Justice of this court, a provision to that effect has been inserted in the Limitation Act just passed. But the decision in *Ashby v. James* rests on another ground, namely, that a settlement of account under such circumstances as existed in that case is, as Rolfe, B., said, "a transaction between the parties out of which a new consideration arises for a promise to pay the balance." But in that case there were mutual accounts and cross-demands, and the settlement of account was an agreement that the debts due to the defendant should be set off against the debts due to the plaintiff, and the balance be paid by the defendant. That is a different case from the one before us, in which there were no mutual transactions, and nothing of the nature of a set-off, but only the plaintiff's accounts showing a debt due, and payments from time to time made by the defendant. The distinction is stated in Leake on Contracts, p. 70: "An account stated respecting a debt, which has not accrued due within six years of the action brought for its recovery, must be in writing, signed by the party chargeable thereby, under Lord Tenterden's Act, 9 Geo. IV., c. 14, s. 1, which requires the acknowledgment of debt to be made in that form in order to take the debt out of the statute of limitations. But where an account is stated respecting debts on both sides, and it is agreed that the cross-demands shall

be set off and a balance stated, it is no objection to such account that some of the earlier items were barred by the statute of limitations, and that there is no valid acknowledgment within Lord Tenterden's Act, because the agreement to set off operates as payment of the items to which it applies: *Ashby v. James*, 11 M. & W. 542; *Clark v. Alexander* (8 Scott N. R. 147, 166)."

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I may remark that my judgment is in accordance with the decisions of all the other High Courts: *Doyle v. Allum Biswas*, 4 W. R. (S.C.) 1, followed by the Full Bench of the A'grá High Court in *Kunbya Lall v. Eunsee*, 1 A'grá F. B. 94; *Subbarama v. Eastulu Muttusami*, 3 Mad. 378. The reports of all these cases show that *Ashby v. James*, was relied on by the defendants, and considered by the Courts.

*Special Appeal No. 124 * of 1870.*

January 19.

DULIA' KA'SAM *Appellant.*
ABRA'MJI SA'LE *Respondent.*

Revenue Survey Act—Right of Tenant to hold Land upon payment of reasonable Assessment—Usage—Special Contract varying Usage.

Sec. 36 of Bombay Act I. of 1865 applies only to lands to which a revenue survey has been extended under that Act.

Prior to the passing of the above Act, by usage having the force of law, Government was unable to eject an ordinary tenant of land so long as the latter was willing to pay the reasonable assessment upon the land occupied by him.

This usage might be limited or varied by special contract, *e.g.*, by the terms of a lease inconsistent with it.

THIS was a special appeal from the decision of C. G. Kembball, District Judge of Súrat, in Appeal Suit No. 199 of 1869, confirming the decree of the Second Class Subordinate Judge of Olpár.

The plaintiff (and respondent), Abrámji Sále, sued to recover possession from the defendant of 10 *bighás* 17 *pans* and 5 *kathas* of land situate in the *bhágdári* village of Adajan,

* S. A. Nos. 125 and 126 were dependent upon, and governed by, the judgment in this case.

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with the trees growing thereon. There was also a claim for the value of the crops of the Samvat year 1925.

It appeared that the defendant in 1855-56 had obtained a lease of the lands in question for ten years. (The lease also included certain other lands held by the defendants in the other suits referred to in the judgment of the District Judge.) Before the expiration of the above lease, in the year 1864, the Collector of Súrat required the defendant to enter into an agreement to pay the full assessment upon certain grass-land that was included in the lease, and therein rented at a small assessment. The Collector also informed the defendant, on the expiration of his lease, that he would be continued in the occupation of the land; but a fine was demanded from him, which the defendant refused to pay.

On the 26th of March 1868, the Revenue Commissioner issued an order setting aside the prior order of the Collector, and directing the right of occupancy in the land to be put up for sale, which was accordingly done, the plaintiff becoming the purchaser.

The remaining facts, and the respective contentions of the parties upon the facts, appear from the judgment of the District Court.

The Subordinate Judge made a decree in favour of the plaintiff.

On appeal, the District Judge of Súrat confirmed the decree of the Subordinate Judge, and gave judgment as follows:—

“The facts in this and four other appeals are the same. It appears that in the *bhāgdāri* village of Adajan there were some 370 *bighās* of Government land entered in the *bhāgdār pūtil's* name. In 1856 ten persons applied to the Collector of Súrat to give them a ten years' lease of 105 of the said *bighās*, which were lying waste, at a certain fixed rent. The Collector assented, an agreement of lease was executed by the applicants, and they entered into possession, each individual taking as his share a certain portion of the land. At the expiration of the term the lessees were offered a con-

tinnance of the occupancy on payment of a lump sum down, and of increased rent ; they, however, refused, and the right of occupation was then sold and bought by the plaintiff. The question for consideration in all these five appeals is whether or no the tenancy was determined at the end of ten years. For the appellant it is argued that, under Reg. XVII. of 1827 and Bombay Act I. of 1865, the lessees, having been once admitted, acquired a right to remain for ever, quite irrespective of any agreement for a definite term : in other words, that their tenancy could only determine with their own consent and by their own act. But there is nothing in either of those laws applicable to such a case as this. Act I. of 1865 has reference only to lands brought under the survey. Had the lessees without more agreed merely to cultivate the land in dispute, then I think the argument now urged would have had great force ; but it is clear that they are only entitled to possession in virtue of the lease above referred to, and that lease obviously fixed the moment from which the lessees' right to the possession determined, and the Government's reversion became a right to the possession, both parties having notice of the period of determination. I consider that the lower court rightly decided that the defendant's right of occupation had ceased, and that the plaintiff, having purchased of Government the right of possession, was entitled to eject him. The decision also regarding the trees I consider to be in accordance with the evidence. The decree of the lower court is affirmed with costs on the appellant."

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The special appeal was argued before GIBBS and MELVILL, JJ.

Nánábhái Harulás for the appellant.

MELVILL, J.:—In these cases the appellants are tenants of certain lands granted to them in 1855-56, under a lease from the Collector of Súrat. The respondents are the purchasers of the right of occupancy, which was put up to sale by the Collector, under the orders of the Revenue Commissioner, after the expiration of the appellant's lease.

It has been argued on behalf of the appellants that they

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are entitled to claim the benefits of Sec. 36 of Bombay Act I. of 1865, which provides that an occupant of land shall not be liable to be ejected so long as he pays the Government assessment; and that, even if that Act be held inapplicable, the same principle was recognised in Reg. XVII. of 1827, and was enforced by numerous decisions of the Šadr Divāni Adálat.

Sec. 36 of Act I. of 1865 applies only to lands to which a revenue survey has been extended under that Act, and it does not appear that at the time of the sale to the respondents there had been any such survey of the lands in dispute.

Previously to the passing of that Act there was undoubtedly a usage, which has been recognised as having the force of law, which prevented the Government, or superior landholder, from ejecting an ordinary tenant so long as the latter was willing to pay such reasonable assessment as might be demanded of him. But it cannot be held that the Government had not the power to limit this usage by special contract. We should be imposing a most unreasonable and arbitrary restriction upon the rights of the Government as landlord, if we were to decide that it is not competent to the Government to let waste land for a term of years, reserving the right to deal with the land as it pleases at the expiration of the lease.

In these cases the lease to the appellants (exhibit No. 70) expressly gave the right of occupancy for a period of ten years, and no more. In the absence of any mention of an intention to extend the right of occupancy beyond that term, we think we must hold that there was no such intention, and no such extension of right. If there be any doubt as to the construction of the lease, it must be construed in favour of the Crown, which is the lessor.

If, then, we only have regard to the lease No. 70, we must, we think, hold that at the expiration of the ten years named in the lease the Government had a perfect right to sell the land to the highest bidder.

But it has been contended that by the subsequent acts of the Government a new contract was created, which superseded the lease No. 70, and placed the appellants in the position of ordinary tenants, not liable to be evicted as long as they paid the assessment.

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As regards the grass-land, there certainly appear to be good grounds for this contention. The lease, exhibit No. 70, gave this grass-land at a low rate of assessment from 1855-56 to 1865-66. Yet some time before the expiration of the lease, namely, on the 27th of August 1864, the tenants were required to enter into a new agreement (exhibit 64), by which they covenanted that, in consideration of their not being disturbed in the possession of the grass-land, they would pay the *kamāl* or full assessment upon it. This new agreement contains no limitation as to the time. The words are: "We agree to pay the *kamāl* rate on account thereof from Samvat 1921" (A.D. 1864-65). It seems clear that the intention of the new agreement was that the tenants should be continued in possession of the grass-land on payment of full assessment after the expiration of the two years which had still to run under the original lease. Indeed, such continuance of possession was the only advantage which the new agreement secured for the tenants, and the only consideration which there could be for the promise to pay full assessment: for during the continuance of the original lease the Collector could have no power to require them to pay more than the assessment fixed by the lease upon the grass-land.

As regards the grass-land, therefore, we think that the lease No. 70 was superseded by a new lease, under the provisions of which the appellants became ordinary tenants, not liable to be evicted as long as they paid assessment. The Revenue Commissioner's order, to which we shall presently refer, does not appear to affect this new lease, and it may be doubted whether he had cognisance of it. At any rate, it would not be competent to him to upset it, after the full assessment had been paid in accordance with it since the year 1864-65. Nor can it be said that the appellants have

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forfeited their right by any refusal to pay assessment on this land. In point of fact the assessment never appears to have been raised, and all that the appellants have refused to do is, not to pay assessment, but to pay a fine or premium in addition to assessment.

We hold that the appellants are entitled to the possession of the *sudá* or grass-land, as long as they pay the assessment, and that the sale of this land to the respondents must be set aside.

As regards the other land, we think that the respondent is entitled to recover. It is true that on the expiration of the lease No. 70 the Collector informed the appellants that they would be continued in possession of the land. If the Collector's order had continued in force, it might be held to amount to a new lease, on the terms of ordinary tenancy. But on the 26th of March 1868 the Revenue Commissioner issued an order setting aside the order of the Collector, and directing that the right of occupancy should be put up to sale. Thus the Collector's order became inoperative, and matters were relegated to the same state in which they were on the expiration of the lease No. 70, at which time the Government certainly had the power to sell the right of occupancy.

We do not think it necessary to consider the question whether the appellants were entitled to six months' notice of the determination of their tenancy. This point has not been relied on in the courts below, nor in the memorandum of special appeal, and has only been casually introduced in the course of the pleading.

We amend the Judge's decree, and award to the respondent possession of the land claimed, with the exception of such part of it as may form portion of the 45 *bighás* granted at *sudá* rates under the lease, exhibit No. 70.

Costs in proportion.

Decree accordingly.

*Miscellaneous Special Appeal No. 19 of 1870.*1871.
Jan. 19.LAKSHMAN SHIVA'JI *Appellant.*RA'MA ESU *et al.* *Respondents.**Award—Arbitration—Filing of Award made without intervention of Court—Appeal—Civ. Proc. Code, Sec. 327—Stamp—Court Fees' Act (VII. of 1870).*

An application to the High Court to set aside an order of a District Court, reversing an order of a court of first instance directing an award made without the intervention of a court to be filed, should be treated as an application for a miscellaneous special appeal. Such an application may be made, on a stamp of the value of two rupees, under Sch. II., No. 11, of the Court Fees' Act (VII. of 1870).

An appeal lies from an order directing an award made without the intervention of a Court of Justice to be filed in court.

THIS was a special appeal from the order of R. W. Hunter, District Judge of Ratnágirí, reversing the order of the Subordinate Judge of Khárepátan.

The facts of the case were as follows:—The appellant and respondents, by a written agreement, submitted certain matters in difference between them to the arbitration of six arbitrators, and it was agreed that if any of the arbitrators should be prevented from attending the meetings the others might take the evidence in their absence, and decide the matters before a certain time. The evidence was taken before all the arbitrators, but, as they did not agree on a decision within the appointed time, the time was extended. Before the expiration of the extended time, an award was made, signed by four only out of the six arbitrators, the other two having declined to sign it. An application was made to the court of Khárepátan to file the award, and a day was appointed for the parties to appear and make any objections they might have to make, and it was then ordered that the award should be filed. An appeal was preferred against this order, which the District Judge entertained. He reversed the order of the lower court, and referred the parties to a regular suit.

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The special appeal was heard before LLOYD and KEMBALL, JJ.

Pándurang Balibhadra appeared for the appellant.

Shivshankar Govindrám appeared for the respondents.

LLOYD, J. :—This is an application brought under Sec. 35 of Act XXIII. of 1861, it being urged that there was no appeal to the Judge of Ratnágiri in this case. A preliminary objection was raised by the special respondent's Vakíl, that the petition to this court should have been on a stamp of the value of seven and a half rupees, under Sch. I., No. 1, of the Court Fees' Act; but we are of opinion that the practice which prevails in this court, of receiving such petitions on a stamp of two rupees' value, under Sch. II., No. 11, of the said Act, is correct; the objection, therefore, is overruled.

The circumstances of the case are fully set forth in the Judge's minute, and the chief point to which we have to direct our attention is, whether it was competent to the Judge to reverse an order for filing an award passed under Sec. 327 of the Civil Procedure Code.

Many decisions have been quoted in support of the argument on both sides, but few of them have any applicability to the point at issue.

Great stress has been laid on an observation which fell from the late Chief Justice, Sir Richard Couch, in the course of his judgment in the case of *Vyankatesh Rámchandra v. Bálájiráv* (a), from which it would seem that he held the opinion that no appeal would lie in a case of this kind; the point, however, was not the one then under discussion, and it was a mere passing remark, which, though deserving of the highest consideration, is not binding on us. It was, however, determined in that case, and in others that have been cited, that a refusal, under Sec. 327, to file an award is not appealable, because it is not a decree.

Of the correctness of this view we see no reason to doubt; and, on the other hand, it appears to us that an order to file

(a) 1 Bom. H. C. Rep. 184.

an award is tantamount to a decree, because, on that order being passed, "the award may be enforced as an award made under the provisions of this chapter," *i.e.*, "as other decrees of the Court" (Sec. 325).

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Taking the order, then, to have the force of a decree, it is appealable, under Sec. 23 of Act XXIII. of 1861, and this view seems to be in consonance with that expressed in the case of *Wolee Alum v. Bibee Misrun (b)*.

We see, therefore, no grounds for holding that the Judge "exercised a jurisdiction not vested in him by law;" and as it has not been shown to our satisfaction that he misconstrued the submission-paper, and we have nothing to do with his appreciation of the evidence before him, we dismiss this application and saddle Lakshman Shiváji with the costs.

Special Appeal No. 29 of 1870.

Jan. 30.

ARLA'PA' NA'YAK *Appellant.*

NARSI KESHAVJI AND CO. *Respondents.*

Contract—Variation in Time for Delivery—Custom.

Where a principal instructed his agent to enter into a contract for the delivery of cotton at the end of Kártik, but the agent entered into a contract for the delivery thereof by the middle of that month :

It was *held* that the agent exceeded his authority in such a manner as to exempt the principal from liability upon the contract.

Though the objection assigned by a principal for repudiating a contract at the time of such repudiation be unfounded, he is not precluded from subsequently availing himself of other valid objections.

A custom which allows a broker to deviate from his instructions is unreasonable, and the courts of law will not enforce it.

THIS was a special appeal from the decision of A. L. Spens, Judge of the District of North Cánará, in Appeal No. 110 of 1868, reversing the decree of the Principal Šadr Amín of Honore.

The special appeal was argued, on the 30th of November 1870, before GIBBS and MELVILL, JJ.

(b) 12 Calc. W. R., Civ. R. 50.

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The Honorable A. R. Scoble (Acting Advocate General) (with him *Dhīrajāl Mathurādās*, Government Pleader) appeared for the appellant.

Anstey (with him *Shāntārām Nārāyaṇ*) appeared for the respondents.

The facts fully appear from the following judgment:—

MELVILL, J.:—In this case the appellant authorised a broker, Krishṇāppá, to contract on his behalf for the delivery of fifty *kandis* of cotton on certain terms.

Two of the conditions contained in the letter of instructions were that the cotton should be delivered by the end of the month of Kártik, and that half the purchase-money should be paid at once. Krishṇāppá was further informed that the appellant would hold the contract void unless he should receive intimation of its completion within eight days from the date of the appellant's letter.

Thereupon Krishṇāppá entered into a contract with the respondents for the delivery of fifty *kandis* of cotton, not by the end of Kártik, but by the 15th of that month. The price fixed was Rs. 220 per *kandi*, or altogether Rs. 11,000. Instead of taking half this sum, or Rs. 5,500, from the respondents, Krishṇāppá accepted a *hundī* for Rs. 5,000 payable fifteen days after date. This he sent to the appellant, who wrote and repudiated the contract, not on the ground of any deviation from his instructions, but because, as he alleged, Krishṇāppá's letter had not reached him within eight days. The appellant retained the *hundī* for a time, offering Krishṇāppá the option either of having the *hundī* returned to him, or of receiving cotton to the value of Rs. 5,000.

The Judge has found that Krishṇāppá's letter did reach the appellant within eight days, and, therefore, that the appellant's avowed reason for repudiating the contract was unfounded. We do not, however, think that the appellant's omission to specify immediately all his objections to the contract prevents him from relying on those objections now.

His silence cannot be construed into a ratification of anything that had been done, for he distinctly repudiated the contract *in toto*. His retention of the *hundī* was not a ratification, for the appellant distinctly informed Krishṇáppá that he retained it, not as part consideration for the contract which had been entered into, but as consideration for a new contract into which he was willing to enter. Nor are we able to find, in the examination of the appellant's Pleader, any sufficient grounds for the Judge's observation that the Pleader had in his examination (exhibit No. 21) altogether waived the objections which the appellant had raised in his answer.

Being, then, of opinion that if the act of Krishṇáppá was unauthorised, there has been no such subsequent ratification by the appellant as would render the contract binding upon him, we have only to consider whether Krishṇáppá exceeded the scope of his authority in such a manner as to exempt his principal, the appellant, from liability. The rule of law is very clearly laid down by Story in his work on Agency, Sec. 165 :—"It may be laid down as a general rule that, in order to bind the principal (supposing the instrument to be in other respects properly executed), the act done must be within the scope of the authority committed to the agent. In other words, the authority or commission must be punctiliously and properly pursued, and its limitations and extent duly observed, although a circumstantial variance in its execution will not defeat it. If the act varies substantially (and not merely in form) from the authority or commission in its nature, or extent, or degree, it is void as to the principal, and does not bind him." Now we find it impossible to say that in fixing the middle of Kártik, instead of the end of Kártik, for the delivery of the cotton, the agent in this case did not exceed his authority to a very material degree. The appellant's letter of instructions contains the following words:—"I will deliver the property at Kumṭá by the end of the month Kártik. * * * It cannot be supplied in the month of Ashvin, for should the rain fall continually the time will be lost." There was, therefore, a good reason for fixing the end of Kártik, or middle of November, as the

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limit of time for delivery, and in the event of a late rainy season the appellant might have been seriously prejudiced if he had been obliged to make delivery by the end of October. We must hold that the contract varied substantially from the authority, and the respondent was perfectly aware that it did so, for the evidence shows that Krishnappa's letter of instructions was shown to and deposited with the respondent.

The Judge alludes to the commercial custom among buyers and sellers of cotton at Kumptá, and on referring to the evidence for an explanation of this allusion we find that witnesses have been called to prove that, by the custom of Kumptá, a broker acting for a distant principal is allowed to deviate from his instructions if the state of the market appear to render it desirable. Witness No. 63 says that a broker, under such circumstances, may use his own discretion, unless the principal expressly tells him that he will not be bound by any contract which is not in accordance with his instructions; and that even in that case the principal is bound by the contract, though he may recover damages from the agent.

Even if such evidence were sufficient to establish the existence of a custom, it would be impossible to hold such a custom to be a reasonable custom, since it would deprive a principal of all security, and leave him at the mercy of his agent. In a recent case, *Ireland v. Livingston (a)*, to which our attention has been directed by the learned Advocate General, an agent in the Mauritius was authorised by a principal in England to ship to England a cargo of five hundred tons of sugar. Instead of shipping a single cargo of five hundred tons, the agent shipped four hundred tons in different vessels, and was about to complete the order when the contract was repudiated by the principal. The agent justified himself on the ground of the custom or course of business at the Mauritius; but, although the court was of opinion that the agent had acted *bonâ fide*, and that the defendant, the principal, was taking advantage of what was an honest act for the purpose of relieving himself from

(a) L. Rep. 5 Q. B. 516.

the consequences of a falling market, it was held that the defendant's letter was for a single cargo of five hundred tons in a single ship; and that, the order being unambiguous, the custom or course of business at the Mauritius could not affect the construction to be put upon it; and that the plaintiff's purchase and shipment of four hundred tons were not in compliance with that order. The judgment of the Court of Queen's Bench was, therefore, reversed, and judgment entered for the plaintiff.

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In the present case we must reverse the judgment of the District Judge, and disallow the claim against the appellant, with costs on the respondent throughout.

Decree reversed.

Special Appeal No. 538 of 1870.

Feb. 6.

KHANDU valad KERU *et al.* *Appellants.*
 TA'TIA' valad VITHOBA' *Respondent.*

Small Cause Court—Question of Title—Special Appeal.

A suit to recover the price of the skin and flesh of an ox, brought by a Máhár who asserted an hereditary right to carry away dead animals of the village to which he belonged, and take their skins, is a suit for damages, and cognisable by a Court of Small Causes.

Although a question of title be incidentally gone into in such a suit, no special appeal lies, under Sec. 27 of Act XXIII. of 1861.

A decree passed in a suit of this nature is not a bar to a suit for a general declaration of title.

THIS was a special appeal from the decision of A. Bosanquet, Judge of the District of Ahmednagar, in Appeal Suit No. 333 of 1869, confirming the decree of the Subordinate Judge of Karád.

The plaintiffs brought this action in the Court of the Subordinate Judge of Karád to recover Rs. 6, being the price of the skin and flesh of an ox belonging to the defendant, Tática, which died on the 28th of January 1869. The plaintiffs alleged that they, being the hereditary Máhárs of the village of Koregám, were entitled to carry away dead animals

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and take their skins. The defendant caused the ox to be carried away by the *Mángs*, and himself took the skin.

The defendant denied the plaintiffs' right.

The Subordinate Judge rejected the plaintiffs' claim, and the District Judge, in appeal, confirmed the decree of the Subordinate Judge.

A special appeal having been preferred to the High Court and registered, it was set down for hearing before LLOYD and KEMBALL, JJ.

Bahiravnáth Mangesh (for *Dhirajlál Mathurádás*, Government Pleader) appeared for the appellants.

Shivshankar Govindrám for the respondent.

Shivshankar Govindrám objected that no special appeal lay in the case, as the suit was one cognisable by a Court of Small Causes.

Bahiravnáth Mangesh, contra:—The suit is not one cognisable by a Court of Small Causes, and even if it is, a special appeal will lie, as a question of title has been inquired into: *Dikshít v. Dikshít* (a). That was a decision of three Judges, and must either be followed, or overruled by a Full Bench. The subsequent ruling in *Ratanshankar v. Gulábshankar* (b), being passed by two Judges, is of inferior authority. [LLOYD, J., referred to *Roghooram v. Ramchunder* (c) and *Godji v. Chokha*, Special Appeal No. 1 of 1868, and said that a Small Cause Court could go into a question of title incidentally.] A Small Cause Court can go into a question of title in cases of trespass, but not in other cases.

PER CURIAM:—The Court is of opinion that this is a claim for damages, and, therefore, cognisable by a Court of Small Causes, and that, though the question of title has been incidentally inquired into, no special appeal lies: Sec. 27 of Act XXIII. of 1861. This decision will not be a bar to the plaintiffs' bringing a suit for a general declaration of their title.

Special appeal dismissed with costs.

- (a) 2 Bom. H. C. Rep. 4. (b) 4 Bom. H. C. Rep., A. C. J. 173.
 (c) Calc. W. Rep., Special No., F. B. 127.

Miscellaneous Special Appeal No. 30 of 1870.

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Feb. 8.

MAHA'RA'JGIR, heir of Narpatgir, deceased—
ed, heir of Krishngir, also deceased ... *Appellant.*

ANANDRA'V and YA'DAVRA'V, sons and
heirs of Krishnaráv Malhár Somvausi,
deceased *Respondents.*

Sardár—Sardár for Rank and Precedence only—Jurisdiction.

Where a person's name was entered in red ink in the Dakhan Sardárs' list, indicating that he was entitled only to the rank and precedence of a Third Class Sardár :

It was held that a Subordinate Judge had jurisdiction to inquire into an application for execution of a decree passed against his ancestor by the Agent for Sardárs in the Dakhan.

THIS was a special appeal against the order of A. Bosanquet, Judge of Ahmednagar, reversing the order of the First Class Subordinate Judge at that station.

On the 15th of November 1839 a decree was passed by the Agent for Sardárs in the Dakhan in favour of the appellant's ancestor against the ancestor of the respondents. It was not fully satisfied, and an application was, therefore, made to the First Class Subordinate Judge of Ahmednagar, who under date the 7th of June 1869, issued an order for the attachment of the respondent's *jáhágirí* rights over the villages of Javli and Shirasgám. An appeal was made to the District Judge, who reversed that order, recording the following reasons :—

“Exhibit No. 12 shows that the appellant Anandráv Krishn's name has been entered in the third class of the Agent's list of Sardárs ; but the respondent produces exhibit No. 15, a certificate by the Agent to show that Anandráv Krishn's name has been entered in the list in order to confer honour on him. No doubt, that was the object of entering his name in the list of Sardárs, just as it was the object of Reg. XXIX. of 1827, Sec. 3, to confer honour on certain persons of rank. Cl. 3, Sec. v. of Reg. XXIX. of 1827 clearly shows that suits against persons belonging to the third of

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the classes comprised in the Agent's list shall be conducted and tried by the Agent. The word "suits" includes all subsequent execution proceedings. The words "against the persons of" used in the 3rd clause are the words used in the two previous clauses, and have always been held to include the property of the persons in question."

The special appeal was heard by LLOYD and KEMBALL, JJ.

Ráv Sáheb Vishvanáth Náráyan Mandlik and Ganpatráv Bháskar for the appellant.

Shivshankar Govindrám for the respondents.

PER CURIAM:—From the letter of the Agent for Sardárs addressed to Anandráv bin Krishnaráv, and also from the way in which this gentleman's name appears * in the list of Sardárs dated 16th July 1869, and published in the *Government Gazette* of the 12th of August 1869, it is evident that Anandráv is entitled only to the rank and precedence of a third-class Sardár, and as there is no evidence that he has been relieved from the jurisdiction of the ordinary Civil Courts, the Court must hold that the First Class Subordinate Judge of Ahmednagar had jurisdiction in the case. The order of the District Judge is, therefore, reversed, and the case remanded to him for disposal on the other points raised in the appeal. Costs of application on Anandráv.

District Judge's order reversed, and case remanded.

* The name is written thus, in red ink: "17—Anundrao Kristnarao Somoonshee, Juvlay, Ahmednuggur, 7th October 1869. The Agent for Sirdars in the Deccan—*vide* Government Resolution No. 2270 of 7th October 1869." And at the top of the list there is an "N. B." to the following effect:—"The names in red ink are those of the Sirdars for rank and precedence only."

*Special Appeal No. 468 of 1870.*1871.
Feb. 27.

YELLA'PA' valad BHIMA'PA', and KA'SKIA'
 valad MUDKIA' *Appellants.*
 MA'NKIA', a minor, by his guardian Sále
 kom Shetiá *Respondent.*

*Cause of Action—Máhár—Right to share in the Carcasses of
 Dead Animals.*

A suit by one of the Máhárs of a village against his fellow-Máhárs to establish his right to share in the Máhárs' perquisites, such as the carcasses of dead animals, &c., will lie, though such a claim be not tenable against the ryots who may have owned such animals when alive.

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge at Kalladgi, in Appeal Suit No. 11 of 1870, confirming the decree of the Subordinate Judge of Bijápur.

The plaintiff, Mánkiá, alleged that he was entitled to a two-annas share in the Máhárs' *watan* in Mouje Bedzurgi, Táluká Bijápur, and as such was entitled to share in all the customary perquisites (the carcasses of dead cattle, &c.), and that the defendants had obstructed him in the enjoyment of his share of such proceeds on the 1st of June 1869. He claimed to recover these proceeds or their value, estimated at 25 rupees.

The defendants answered that the plaintiff had not a two-annas share in the *watan*, but that he acted as a substitute for the true sharer during the absence of the latter from the village, and, as the true sharer had returned to the village, the plaintiff had no longer any claim.

The Subordinate Judge of Bijápur found in favour of the plaintiff.

The defendant thereupon appealed to the Acting Senior Assistant Judge at Kalladgi, who recorded the following judgment in confirming the decision of the lower court:—

“The evidence on either side is entirely oral, and, as usual in cases of this kind, open to several objections. An appellate court, in trying a case like this, must necessarily attach great weight to the judgment of the Judge who heard all the evidence; and I cannot say that I see any reason,

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upon the whole, to lead me to think that the decision is contrary to evidence.

“It seems that both parties are agreed that the *watan* is divided into two principal shares of eight annas each, and that the dispute in this case is as to a fourth-share of one of these principal shares. There seems to be no difference of opinion as to who are the owners of the other three-fourths of this share, but the defendants say that the plaintiff has been holding the remaining fourth-share for the true owner, while the plaintiff asserts that he is the actual owner of the share.

“There is certainly a good deal of improbability about the defendants' story, and, although faults may be detected in the evidence put in by the plaintiff, I cannot say that the Subordinate Judge has erred in attaching more weight to the plaintiff's witnesses than to the defendants'.”

The defendants appealed from this decision, and the appeal was argued before GIBBS and MELVILL, JJ.

Dhirajlál Mathurádás, for the appellants, submitted that as the Mahárs of a village, as against the owners of cattle, had no right to the carcasses of such cattle, no action would lie to establish such a supposed right.

Ganesh Hari Patvardhan for the respondent.

GIBBS, J. :—It has been objected, on the part of the special appellants, that the plaintiff's claim cannot lie, as it has been repeatedly decided in this court, in suits for the proceeds of the carcasses of dead cattle between the Mahárs and the ryot-owners of the cattle, that the person who owned the cattle while alive has also a right to the property in the dead carcass of such cattle, and may dispose of it to anybody he pleases. The present suit, however, is not of that description. Though the owner of cattle is not bound by the Mahár's rights, yet, as between themselves, a Mahár has a right of action against his brother-Mahárs for a share in the proceeds of the perquisites of the *watan*, which is their common inheritance. No ground in law has been shown for reversing the decree appealed against. We, therefore, confirm the decision of the lower courts, with costs on the appellants.

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J. L. R. 2
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KHODA' JAVRA' *Defendant.*

And see

1. L. R. 2
Born. 360.

“ Sec. 3 of Bombay Act V. of 1864 states that ‘all suits under this Act shall be commenced by a plaintiff, which shall be presented to the Mámlatdár in open court by the plaintiff in person, or by his recognised agent.’ This appears to

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allow the employment of Mukhtiárs, and they generally practise in the Mámlatdár's Court; but there is no recognised standard by which their fee is regulated. There is nothing said about the award of costs in the Act above referred to. Mámlatdárs, as far as I know, do not award them. The Mámlatdár's order, produced by the plaintiff, is silent about them. Hence the party gaining the case has brought a claim for damages in this court.

“ With reference to the first question, my opinion is that the claim is maintainable; and with reference to the second, I think that such fee as the court may think fit may be allowed. As there is no provision in the Act above referred to in respect to costs, and as there is no standard of fees for Mukhtiárs, I entertain some doubts on the subject, and hence make this reference.”

The reference was considered by WESTROPP, C. J., and KEMBALL, J.

PER CURIAM:—The Court is of opinion that an action for the recovery of costs incurred in the Mámlatdár's Court, in defending a claim for possession of land under Bombay Act V. of 1864, is not maintainable. This Act, except in Sec. 11, is silent as to costs. That section relates only to costs as between witnesses and the parties respectively requiring their attendance. The Act makes no provision whatever for the award of such costs as are sued for now in the Court of Small Causes, namely, costs as between party and party; the Court, therefore, thinks that it must infer that the Legislature did not intend that costs should be recoverable. The Court, therefore, cannot see how it can be properly held that such an action will lie. The second question, namely, Can the Mukhtiár's fee be included in the costs? and, if so, at what rate? is only a branch of the first, and the Court directs that both questions be answered in the negative.

Reply accordingly.

Special Appeal No. 548 of 1870.

1871.
March 28.

BA'I KESAR, widow of Nichhá *Appellant.*
BA'I GANGA', widow of Raghá, & MAKANJI
DULLABH *Respondents.*

Minors' Act (Bombay)—Vesting of Minor's Property—Unauthorised Alienation—Guardian of a widowed Daughter-in-law—Repayment of Purchase-money.

A Hindu widow is the proper guardian of her deceased son's widow, in the absence of any person claiming a preferential title to succeed to the estate of the latter.

An alienation by the natural guardian of a ward's immoveable estate made without having obtained a certificate under the Minors' Act is invalid.

The Court, while declaring such an alienation invalid, will, under special circumstances, order the ward to repay the amount of the purchase-money paid to the guardian, before setting aside the sale and directing the alienated property to be made over to the ward.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of the District of Súrat, in Appeal Suit No. 82 of 1870, amending the decree of the Munsif of Balsád.

The special appeal was argued before GIBBS and MELVILL, JJ.

Nánábhái Haridás for the special appellant.

Nagindás Tulsidás for the respondent Mankanji Dullabh.

There was no appearance for the respondent Bái Gangá.

The facts, in so far as they are material, sufficiently appear from the following judgment:—

GIBBS, J.:—This is an action brought by the guardian of Bái Kesar (and the subsequent proceedings after her coming of age have been carried on by Kesar herself) to have a sale of half a house, and a mortgage of some fields, set aside, and to have the property, *i.e.*, the entire house and fields, made over to her, she alleging that Bái Gangá had no power to alienate or to retain any of the property.

The facts found are these:—Nichhá, when a minor, married Kesar, and died in A.D. 1863, before he came of age, leaving

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his widow childless. It appears that the mother of Nichhá, Báí Gangá, had administered to her minor son's property from the time of her husband's death, and, for what the lower courts have found to be necessary' expenses, incurred debts, to meet which she, as manager, mortgaged some fields in 1863, before Nichhá died, and also about October 1864 sold half the family house to Makanji.

Act XX. of 1864 came into force on the 24th of March of that year, and in 1866 Kesar's mother applied for a certificate of administration to Kesar, which was granted, and she then filed this action.

The Subordinate Judge found on re-trial that Kesar was entitled to all Nichhá's estate, except what Gangá had a claim to as maintenance; but he found Gangá had power to make alienations as mother and guardian, and also that she could keep some of the property on account of maintenance.

The District Judge amended the decree of the Subordinate Judge in regard to Gangá's maintenance, but in other respects confirmed it.

Kesar specially appeals, and it is admitted that the mortgage made before Nichhá's death cannot be disputed, and that the only point for us to deal with is whether the sale of the half-house in 1864 by the mother-in-law, after the passing of Act XX. of 1864, and without her holding a certificate under that Act, is good or not.

On this point our attention has been drawn to S. A. No. 391 of 1869—Couch, C. J., and Warden, J.—in which, from a note of their judgment taken by Mr. Dhirajlál, who was engaged in the case, and who obligingly lent it to the Court, it appears they set aside a sale made under circumstances similar to those in the present case, because the manager, the vendor, had no certificate under Act XX. of 1864.

Cases were also cited from 1 Beng. L. Rep., F. B. R., p. 49 (a), and 8 Calc. W. Rep., Civ. R. 331 (b) : these were decisions on the Bengal Minors' Act (XL. of 1858), but we need

(a) *Madhusudan Manji v. Debigobinda Newgi.*

(b) *Mussamut S. Koer v. Boshisht Narain Singh.*

not notice them further, because the wording of that Minors' Act (which, however, formed the model for Act XX. of 1864) differs as regards the 2nd section. In the Bengal Act the property of the minor, it is said, "shall be subject to the jurisdiction of the Civil Courts," while in the Act for Bombay the words are "the property," &c., "shall *vest* in the Civil Courts;" and we think that it was this term "vest," and the analogy to the same term in the Insolvent Debtors' Act regarding the insolvent's property, which, from the time he files his schedule, vests in the Official Assignee, which may have led Sir Richard Couch and Mr. Justice Warden to adopt the view which they did in their judgment.

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But before deciding the point there raised, it would be desirable, we think, to ascertain whether Báí Gangá, as the mother-in-law, was her daughter-in-law's natural guardian after her son's death. No authorities at the argument were shown us on this point, but upon searching the standard works on the subject we have no doubt but that, after the death of Nichhá, his mother was the rightful guardian of his minor widow, and, therefore, could act on her behalf.

Grady's Hindú Law, page 65, quoting from Macnaghten's Principles of Hindú Law, 104, says: "When married, the woman becomes a member of her husband's family, and is under their control, her husband being her natural guardian. In his default, his sons, grandsons, and great-grandsons. In their default, the husband's heirs generally, or those who will inherit his property after her death. In default of them, her paternal relations. In their failure, her maternal kindred" will be the widow's guardians.

Strange, Hindú Law, page 244, establishes the widow's dependence for protection, if she have no sons, "on the near kinsmen of her husband."

In the Dáya-Bhág, Ch. XI., Sec. 1., cl. 64, we find: "When the husband is deceased, his kin are the guardians of his childless widow."

These authorities tend to show that Gangá, after her son's death, was the proper guardian of his widow, as in the event

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of Kesar's death Gangá would inherit, and, such being the case, her alienation would be good had not the Minors' Act intervened. After the passing of that Act, we think that it was not competent to Gangá to alienate immoveable property without having obtained a certificate, and the permission of the court to such alienation. But, before making an order to set aside the sale, we would refer to a case noted in 4 Bengal Şadr Diváni Adálat Reports, p. 243, *Hoo v. Marquis*, quoted by the present Chief Justice in his decision in *Náoroji Berámji v. Rogers (a)*, which may guide us to a decision. Let us collect the facts found by the lower courts; these are an actual management of the estate by Gangá for some years, from her own husband's death until her son's death, and subsequent to that for at least three years more, without opposition by Kesar or any one on her behalf, the *bona fides* found to exist in all the transactions, and the necessity for the debts incurred. These are all held proved, and we may, therefore, follow the principle laid down by the Şadr Court in the case above quoted, and while decreeing that, owing to Gangá not having a certificate under Act XX. of 1864 when she sold it, Kesar may recover the half-house sold to Makanji, we direct that, before she does so, she must, within six months from this date, pay into court the amount of the purchase-money paid by him to Gangá, together with the cost of any improvements or necessary repairs made by him, if there be such, and that should she fail within six months to do so, the sale to stand good. The costs throughout to be borne by Bái Kesar.

(a) 4 Bom. H. C. Rep., O. C. J. 78.

E. 2 La. f. 173.
Bom. 173. Special Appeal No. 599 of 1870.

1871.
 March 29.

YESA'JI A'PA'JI PA'TI'L.....Appellant.

YESA'JI MHA'LOJIRespondent.

Civ. Proc. Code, Sec. 15—Declaratory Decree—Right to be declared Vadil or Elder—Act XI. of 1843.

A suit to be declared *vadil*, or elder, among the holders of a *pátílki watan* will not lie, as upon such declaration no consequential relief can be given: see Act XI. of 1843.

THIS was a special appeal from the decision of A. C. Watt, Acting Senior Assistant Judge of the District of Puná at Solápur, confirming the decree of the Subordinate Judge of Pandharpur.

The special appeal was heard before GIBBS and KEMBALL, JJ.

Shántarám Náráyan for the special appellant.

Nagindás Tulsidás for the special respondent.

PER CURIAM:—In this case the plaintiff sued for a declaratory decree, under Sec. 15 of the Civil Procedure Code, to have it declared that he was *vadil* or elder in the *pátílki watan* of Tánali to the defendant, who was his half-uncle. The lower courts have rejected the claim, because, 1stly, the plaintiff's father not having been *parágundá* (absent) for twelve years, the plaintiff could not, in accordance with Hindú law, sue; and, 2ndly, that by the decision in 2 Bom. H. C. Rep. 342 (a) such a suit as the present will not lie.

The Court concurs with the Senior Assistant Judge in considering that this suit will not lie, and, therefore, need not consider the other ground for rejection given by that officer. The Court would not have deemed it necessary to place any judgment on record, had it not appeared from exhibit No. 17 that the plaintiff was referred to the civil court by the revenue officer of the district, showing that the previous judgments of this court are not understood. We, therefore, record, for future guidance, that, in the opinion

(a) *A'báji bin Sankroji Bhosle v. Niloji bin Báloji Bhosle.*

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of this High Court, no court will give a declaratory decree unless it can also, if asked for, give consequential relief; see the authorities cited in *Beattie et al v. Jetha Dungarsi* (a). Now to apply this principle to the present case. By Act XI. of 1843, the sharers in an hereditary *watan* can select any sharer to perform the duties of the office, or, if the sharers fail to select, the Collector may choose any one of the sharers. If, therefore, a declaratory decree be given, stating that the plaintiff is *vadil*, no consequential relief could follow, as whether he be *vadil* or not he would be just as eligible, and no more so, for the office of *patil*, if the sharers, or in their default the Collector, choose to select him.

If the question had been whether the plaintiff was, or was not, one of the *bhāuband* or sharers in the *watan*, it would have been a different thing, as in the event of his proving himself to be a sharer consequential relief might have been afforded him if the Collector or his co-sharers ignored his rights.

The decree of the lower court must be confirmed with costs.

Decree confirmed.

(a) 5 Bom. H. C. Rep., O. C. J. 152.

*Special Appeal No. 343 of 1870.*1871.
April 5.NA'THA' HARI.....*Appellant.*JAMNI, widow of Vályá*Respondent.*

Hindú Law—Hindú Widow's Right as Representative of her Husband—Cir. Proc. Code, Secs. 104, 203, 210, 249, and 259—Rights of a bonâ fide Purchaser without notice at an Execution-Sale—Liability of a Legal Representative.

Where a Hindú died leaving a childless widow and a separated brother :

It was held that, until a legal representative is appointed to the deceased's estate, his widow is the only person who can defend a suit as his representative ; and that while a decree obtained against the widow will enable a creditor to attach and sell, not only the widow's life-estate in the immoveable property, but also the reversionary estate of the remainderman, yet a decree obtained against the remainderman will not enable the creditor to touch the estate in the hands of the widow.

When a decree has been obtained against A in his life-time, and A dies before execution, A's estate is properly described in the proceedings in execution as the estate of A (Sec. 210, Code of Civil Procedure); and in the certificate of sale the purchaser is properly declared to have purchased the right, title, and interest of A in the property sold ; but this procedure is improper in cases in which the debtor dies before or pending the suit, and the suit is brought or continued against his representative. In such cases the representative, and not the deceased person, is the defendant (Secs. 104 and 203); and in the notification of sale (Sec. 249) and in the certificate of sale (Sec. 259) it ought to be set forth that what is sold is the right, title, and interest of the representative on the record.

A *bonâ fide* purchaser without notice for valuable consideration at an auction-sale is, as a general rule, entitled to protection, notwithstanding any irregularity or defect in the proceedings or decree in the suit. But when the decree is against the representative of a deceased person, the purchaser is bound to satisfy himself that the party sued as the representative of the deceased is his legal representative.

The legal representative of a deceased person, though not a party to the suit, will be bound by the execution-sale, if he either knowingly allowed the suit to be defended by another person claiming to be the legal representative, or if, knowing of the sale, he stood by and allowed the purchaser to pay in the belief that he acquired a good title.

Edalji Hormasji et al. v. Máhabu Begum, Special Appeal No: 266 of 1869, considered.

THIS was a special appeal from the decision of C. G. Kemball, Judge of the District of Súrat, in Appeal Suit No. 10 of 1870, confirming the decree of Davlatrái Samptrái, Subordinate Judge of Balsád.

The special appeal was heard before GIBBS and MELVILL, JJ.

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Nánábhái Haridás, for the special appellant:—The appellant is a purchaser at a court's sale, and cannot be ousted by any irregularities of the suit under the decree of which the sale took place: *Edalji Hormasji and Lakhmidás v. Máhabu Begum*, Special Appeal 266 of 1869, decided on the 21st of September 1869; *Jugal Kishor Baxerjee v. Abhaya Charan Sarma (a)*, *Jan Ali v. Jan Ali Chowdhry (b)*, and *Fyazooddeen Bhoyá v. Shumsunissa Beebee (c)*.

Dhirajlál Mathurádás, Government Pleader, for the special respondent, cited and relied upon *Abdool Hye v. Nawab Ráj (d)*, *Shurfun Beebee v. Collector of Surun (e)*, *Ráyasangji Mádhavasangji et al. v. The Executors of Dáyábhái (f)*, and *Dart's Vendors and Purchasers*, pp. 1092 and 1094.

The following authorities were also referred to: *Gopey mohun Thakoor v. Sebin Cower (g)*, *Chunder Kant Surmah and another v. Bissesur Surmah Chuckerbutty (h)*, and *Story's Eq. Jur.*, para. 385.

Cur. adv. vult.

April 5. MELVILL, J.:—The plaintiff in this suit is a purchaser at an execution-sale under a decree obtained against the estate of Vályá, deceased, who was represented in the suit by his brother Lakhmá. The defendant is the widow of Vályá, and she resists the delivery of possession, on the ground that she, and not Lakhmá, is the legal representative of the deceased, and should have been a party to the suit.

The District Court has found that Vályá and Lakhmá were separated brothers, from which it follows that Vályá's widow is his heir. As such it must be held that (a certificate of administration not having been granted to any one else) she is the sole legal representative of the deceased, notwithstanding that the brother, as reversioner, may be equally interested in the administration of the deceased's estate, and

(a) 1 Beng. L. Rep., A. C. J. 84. (b) 10 Calc. W. Rep., Civ. R. 154.

(c) 12 *Ibid.* 508.

(d) 9 Calc. W. Rep., Civ. R. 186. (e) 10 *Ibid.* 199.

(f) 3 Bom. H. C. Rep., A. C. J. 106.

(g) 2 Mor. Dig. 105.

(h) 7 Calc. W. Rep., Civ. R. 312.

especially in resisting the claims of creditors. "In the case of Hindús," says Sir Edward Hyde East (Notes of Decided Cases, Morley's Digest, Vol. II., p. 111), "the real and personal estate going to the same person, there is no occasion for the mortgage-creditor (or other creditor, according to the nature of the debt) to look to different representatives of his deceased debtor : and if there be no reason for doing so, from the different funds, real and personal, being in different hands, general convenience will be better consulted by preserving the unity of responsibility. Now, not only are the real and personal funds in the same hands, namely, of the widow, in case there be no son, but by the same law she may be sued for any debt of her deceased husband, and, after judgment recovered, execution would go equally against his lands in her hands, as against his personal property. It is, moreover, her duty to pay off the mortgage-debt, as well as all other debts of her husband, provided there are assets, either real or personal : and if she alone may sell, why may not she alone be sued ?"

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We must hold that, so long as no legal administrator has been appointed, the childless widow of a separated Hindú is the only person who can defend a suit as his representative ; and that, while a decree obtained against the widow will enable a creditor to attach and sell not only the widow's life-estate in the immoveable property, but also the reversionary estate of the remainderman, yet a decree obtained against the remainderman will not enable the creditor to touch the estate in the hands of the widow.

But it is contended for the plaintiff that, inasmuch as no fraud or collusion is alleged, either in respect of the suit or the sale under the decree, the plaintiff, as a *bonâ fide* purchaser without notice for valuable consideration, is entitled to protection, notwithstanding any irregularity or defect in the proceedings or decree in the suit. The decision in Special Appeal No. 266 of 1869 is relied on in support of this contention. That was a suit between the purchaser at a sale in execution of a decree obtained against the widow of a Muhammadan, as her husband's representative, and another

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sharer or residuary, who sought to recover his share from the purchaser, on the ground that he had not been made a party to the suit. It is scarcely necessary to observe that the widow of a Muhammadan, when there are other sharers and residuaries, occupies a very different position from that of the childless widow of a separated Hindú, and it would be difficult to hold that the Muhammadan widow, not having taken out a certificate of administration, would, under such circumstances, be the sole legal representative of her husband. That question was not gone into in the case referred to; but it was decided that, whether or not the widow was the sole legal representative of the deceased, the purchaser had acquired a good title by virtue of the certificate granted under Sec. 259 of Act VIII. of 1859.

In that appeal the point was not argued; and, though there was an application for review of judgment, the general correctness of the view adopted by the court was not questioned. But, after hearing the arguments in the present case, we are of opinion that the former decision of the court cannot be supported to its full extent. It is undoubtedly desirable that innocent purchasers at court-sales should be protected, and that they should not be required to go behind the decree in order to satisfy themselves of the regularity of the proceedings in the suit. In *Jan Ali v. Jan Ali Chowdry* (i) it was held that the sale to A under a decree obtained against B was binding against B, notwithstanding that the decree was obtained *ex parte*, notwithstanding that B had never had any knowledge of the *ex parte* proceedings taken out against him until after the sale, and notwithstanding that the decree had been set aside in review. Several authorities bearing on the point are referred to by Sir Barnes Peacock in that case, and by Mr. Justice Norman in *Chunder Kant Surmah and another v. Bissesur Surmah Chuckerbutty* (j). It may undoubtedly be laid down as a general rule that a *bonâ fide* purchaser shall not lose the benefit of his purchase by any irregularity of the proceedings in a cause;

(i) 1 Beng L. Rep., A. C. J. 56; S. C. 10 Calc. W. R., Civ. R. 154.

(j) 7 Calc. W. Rep., Civ. R. 312.

Lloyd v. Johnes (k) ; *Curtis v. Price* (l). But though this rule applies when the person whose property is sold has been a party to the suit (even though he may have been ignorant of the existence of the suit until after the sale), yet we do not find any sufficient authority for holding that a purchaser is not bound to satisfy himself that the party sued as the representative of a deceased person was really his legal representative, or that, if it turn out to be otherwise, the purchaser is entitled to be protected.

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It is quite true that in the present case (and this appears to be the ordinary practice of the Mofussil courts) the property was advertised and sold as the property of the deceased Vályá; and the certificate of sale sets forth that the plaintiff has purchased the right, title, and interest of Vályá in the property sold. At first sight it would appear that, under the provisions of Sec. 259 of Act VIII. of 1859, such certificate must be taken and deemed to be a valid transfer of Vályá's right, title, and interest. But it seems to us that although, when a decree has been obtained against A in his lifetime, and A dies before execution, A's estate is properly described in the proceedings in execution as the estate of A (Sec. 210), and in the certificate of sale the purchaser is properly declared to have purchased the right, title, and interest of A in the property sold, this procedure is improper in cases in which the debtor dies before or pending the suit, and the suit is brought or continued against his representative. In such cases the representative, and not the deceased person, is the defendant (Secs. 104 and 203), and in the notification of sale (Sec. 249) and in the certificate of sale (Sec. 259) it ought to be set forth that what is sold is the right, title, and interest of the representative on the record, and not that of the deceased person. As the whole estate of the deceased vests in his legal representative, the purchaser would be safe (notwithstanding any irregularities in the suit) if the representative on the record were really the legal representative; but on this point he would be bound

(k) 9 Ves. 37.

(l) 12 Ves. 89.

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to satisfy himself, and must take the consequences if it turned out to be otherwise.

Are we then at once to set aside this sale, and without any compensation to the plaintiff? We are very unwilling to do so in the absence of all allegation of fraud or collusion by the plaintiff. It is clear that, in cases of this kind, there is great room for fraud on the part of those who are, or claim to be, the representatives of a deceased person. Among Hindús the right of inheritance depends not only upon degrees of relationship (a matter in regard to which a creditor or intending purchaser might easily satisfy himself), but also upon circumstances of union or partition. Whether a family is in a state of union or partition is a question which our courts often find it very difficult to determine, even though the parties to the inquiry are members of the family, who have all the evidence at their disposal, and whose interest it is to bring all the evidence before the court. How difficult must it be for a creditor to ascertain who is the representative of a deceased Hindú, especially if the members of the family are in league to deceive him. How much more difficult must it be for an intending purchaser, who may be supposed to have even less acquaintance with the circumstances of the family than the creditor who has had dealings with them. What is to prevent the brother of a deceased Hindú from defending a suit, as being an undivided brother and representative of the deceased, and then, if judgment go against him, from combining with the widow to prove that there has been a separation, and that the sale under the decree is void, although the estate of the deceased has had the benefit of it by the payment of the debt due to the judgment-creditor? We do not say that it is so in the present case; but, before we set aside the sale, we are bound to satisfy ourselves that it is not so. And, even if there be no fraud, there still remains the question whether, if the debt for which the property was sold be really due, the widow is in equity entitled both to hold the property free from the sale, and to have the benefit of the sale which has discharged the debt.

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We are not in sufficient possession of the facts to enable us to decide these questions, and we must remand the case in order that they may be determined. We think that Lakhmá, who acted as Vályá's representative in the former suit, must be made a defendant in this action; and as to the law bearing on the case, we make the following observations, which, together with what has been already said, may help to guide the lower courts to the issues which should be laid down, and the principles on which they should be determined.

If Lakhmá intermeddled in the suit with the defendant Jamni's knowledge and consent (and it is difficult to understand why he should have intermeddled in such a matter without her knowledge and consent), then we think that in equity she will be bound by the decree and the sale. Or, again, if Jamni knew of the attachment and sale of the property (and it is difficult to believe that she could have been ignorant of it), and took none of the measures which the law provides for raising an attachment and preventing a sale, then we think that she cannot now dispute the sale. Mr. Justice Story says (Equity Jurisprudence, Vol. I., § 385): "If a man, having a title to an estate which is offered for sale, and, knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former, so standing by, and being silent, will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase." If it be found that Jamni did not put forward Lakhmá to defend the suit, and did not know of the attachment and sale, then we think that the plaintiff should be allowed an opportunity of proving, as against Jamni, that the debt for which the decree was passed was really due. If the debt was really due by Vályá, it was Jamni's duty, as Vályá's representative, to pay it, and Vályá's estate in her hands was liable to be sold for it. She has had the benefit of the sale by the payment of the debt, and cannot in equity avoid the sale and at the same time retain the benefit of it.

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Under the circumstances last supposed, the sale should only be set aside on condition that Jamni pay to the plaintiff within a limited time, if not the entire purchase-money, at least the amount which she ought to have paid to her husband's creditor, the decree-holder.

Decree reversed and case remanded.

April 17.

Miscellaneous Special Appeal No. 36 of 1870.

KESHAVRA'M valad HIRA'CHAND *et al.* ... *Appellants.*
 RA'MCHANDRA TRIMBAK *et al.* *Respondents.*

Ex parte Judgment—Setting aside ex parte Judgment—Time for making Application—Process for enforcing Judgment—Appeal—Civ. Proc. Code, Sec. 119.

A Judge has no jurisdiction to grant an application, made by a defendant against whom an *ex parte* judgment has been passed, to set aside the judgment after the expiration of the thirty days allowed, by Sec. 119 of the Code of Civil Procedure, for making such applications.

Such an application must be made within thirty days after the *first* process for enforcing the judgment against such defendant has been executed.

Though an order passed for setting aside a judgment is, on the merits of the application, final, yet where a Civil Court makes an order setting aside an *ex parte* judgment on an application presented after the period allowed by law has elapsed, an appeal against that order will lie, on the ground that it has been made without jurisdiction.

THIS was a special appeal from the decision of A. Bosanquet, Acting District Judge at Ahmednagar, in Appeal Suit No. 145 of 1870, confirming the decision of the Subordinate Judge of Nivásá.

The plaintiffs, Keshavrám and Maganráam, on the 22nd of June 1868, obtained, in the Court of the Subordinate Judge of Karád, a decree against the defendants, Rámchandra and Náráyan, directing that the land the subject-matter of the suit (which had been mortgaged to the plaintiffs) should be delivered into their possession, and that the defendants should be at liberty to redeem it within a year from the date of the decree, on payment of Rs. 1,600 with interest.

In pursuance of this decree the plaintiffs obtained possession of the property on or before the 24th August 1868. On the 17th of March 1870 the defendant Rámchandra applied to the Court of the Subordinate Judge of Nivásá to set aside the judgment passed by the Subordinate Judge of Karád, on the ground that he (the defendant) had not been served personally with the summons, and that he was not aware of the institution of the suit until his return home, about a month and a half before he presented his petition. The summons had been posted on the door of the defendant's house. The defendant's brother had appeared at the hearing and defended the suit. The Subordinate Judge of Nivásá admitted the application.

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The plaintiffs appealed from this order to the Acting District Judge at Ahmednagar, who confirmed the order of the Subordinate Judge with costs, for the following reasons :

"The point for decision is whether this petition is barred by the law of limitation. This depends on whether the petitioner presented his petition, under Sec. 119 of the Civil Procedure Code (Act VIII. of 1859), within thirty days after the *last* process for execution was executed; for the words of the section are : 'He' (the defendant) 'may apply within a reasonable time, not exceeding thirty days, after *any* process for enforcing the judgment has been executed.'

"The respondent alleges that the last process presented for enforcing the decree has not been executed, and the appellant's Pleader is unable to show that it has been executed."

The special appeal came on for hearing before WESTROPP, C.J., and MELVILL, J.

Shántárám Náráyan, for the respondent, took a preliminary objection that no appeal lay in this matter, as the order setting aside the decree was final, under the provisions of Sec. 119 of the Code of Civil Procedure.

Ganpatráv Bháskar, for the appellants, contended that an appeal lay, and that the thirty days allowed for such applica-

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tions counted from the first, not the last, process of execution. He cited *Rádhá Binode Chowdhry v. Juggut Shurnokar* (a), *Rádhá Binode Chowdhry v. Digamburee Dossee* (b), and *Shaikh Gholam v. Shamsoonder Koonwaree* (c).

The following authorities were also referred to :—*Máharajah Moheshur Sing v. The Bengal Government* (d), *Shama Churn Chuckerbutty v. Bindabun Chunder Roy* (e), and *ShibChunder Bhadooree v. Luckee Debia Chowdhraín* (f).

PER CURIAM :—In this case the decree was one awarding possession under a mortgage, and was also in the nature of a foreclosure decree, twelve months being allowed to the defendant for redemption. The decree was passed on the 22nd of June 1868, and was executed by delivery of the land on or before the 24th of August 1868. On the 17th of March 1870 the defendant Rámchandra presented a petition to the Subordinate Judge, in which he stated that no service of the summons in the cause had been made on himself personally, and that he was not aware of the institution of the suit until he returned home, a month and a half before the presentation of his petition. On these grounds he asked that the judgment passed against him *ex parte* might be set aside. The petition, it is to be observed, was presented more than thirty days after the defendant had necessarily become aware of the execution of the decree, and a year and a half after the decree had actually been executed by placing the plaintiff in possession of the lands. The Subordinate Judge set aside the decree, holding that the defendant Rámchandra had not been aware of the institution of the suit, although the summons had been posted on the door of his dwelling-house, and his brother defended the suit. The Subordinate Judge made no observation whatever on the great delay in presenting the petition. Now, the section of the Civil Procedure Code under which the Subordinate Judge professes to have acted is Sec. 119, which is as follows :—“No appeal shall lie from a judgment passed *ex parte* against a defendant who

(a) 6 Calc. W. Rep., Civ. R. 300. (b) 9 *Ibid.* 236.

(c) 7 *Ibid.* 375. (d) 7 Moo. Ind. App. 283, 303.

(e) 9 Calc. W. Rep., Civ. R. 181. (f) 6 Calc. W. Rep., Misc. R. 51.

has not appeared, or from a judgment against a plaintiff by default for non-appearance. But in all cases in which judgment may be passed *ex parte* against a defendant, he may apply, within a reasonable time, not exceeding thirty days after any process for enforcing the judgment has been executed, to the court by which the judgment was passed, for an order to set it aside; and if it shall be proved to the satisfaction of the court that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall pass an order to set aside the judgment, and shall appoint a day for proceeding with the suit. In all cases of judgment against a plaintiff by default, he may apply, within thirty days from the date of the judgment, for an order to set it aside; and if it shall be proved to the satisfaction of the court that the plaintiff was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall pass an order to set aside the judgment by default, and shall appoint a day for proceeding with the suit. But no judgment shall be set aside, on any such application as aforesaid, unless notice thereof have been served on the opposite party. In all cases in which the court shall pass an order under this section for setting aside a judgment, the order shall be final; but in all appealable cases in which the court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable; provided that the appeal be preferred within the time allowed for an appeal from such final decision, and be written upon stamp paper, of the value prescribed for petitions to the court, where a stamp is required for petitions." It is to be observed that the section begins by saying that the party may apply within a certain time; it then enables the court to consider whether there is any sufficient reason for setting aside the judgment, and thereupon to make an order, which, if it reject the application, is to be appealable, while if it set aside the judgment it is to be final. The question is what is the meaning of the word "final"? We think it clear that the court would have no

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 KESHAVRA'M were made within the time allowed by law. This seems to
 HIRA'CHAND have been the view of the Calcutta High Court, which has
 et al. decided that if a Subordinate Judge has set aside a judg-
 v. ment, on an application presented after the period allowed
 RA'MCHANDRA by law has elapsed, an appeal against his order will lie:
 TRIMBAK *Rádhá Binode Chowdhray v. Juggut Shurnokar (g)*, *Rádhá Bi-*
 et al. *node Chowdhray v. Digamburee Dossee (h)*. The latter case
 is a Full Bench judgment; and though the particular point
 of the admissibility of the appeal was only decided by the
 two Judges who referred the case, yet the other Judges
 raised no objection to their decision on the point, as we think
 that they would have done had they not concurred in it.
 We think that the word "final" can be held to apply only
 to the decision at which the court may arrive as to the
 merits of the case, that is, as to whether there has been due
 service, or sufficient reason for the failure of the party to
 attend; and we hold that an appellate court has a right to
 interfere when the lower court has entertained an application
 after the period allowed by law, and has, therefore, acted
 without any jurisdiction. It is only "an order under this
 section" (119) which is declared to be final. If an order,
 purporting to be made under this section, were not in fact
 so made, but were made under circumstances, which neither
 according to the language, nor the spirit of the section, would
 have conferred jurisdiction upon the Subordinate Judge to
 direct the judgment to be set aside, his order would be
 altogether outside the section. It would be productive of the
 greatest mischief if a Subordinate Judge could set aside a
 judgment and reopen a case after any length of time, with-
 out any remedy to the decree-holder by means of an appeal.
 The rehearing of a case which has been decided *ex parte*
 is no injury to the party who has right on his side, provided
 that the rehearing follow closely upon the original proceed-
 ings, and it is easy to understand why in such a case the law
 allows no appeal from the order reopening the suit; but a
 rehearing after a long interval might, and generally would,
 be a most unfair proceeding to a party who believed, and

(g) 6 Calc. W. Rep., Civ. R. 300.

(h) 9 *Ibid.* 236.

would have good reason for believing, that the question at issue had been set at rest for ever, and his right firmly established.

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On this point we may quote the remarks of the Judicial Committee of the Privy Council in *Maharajah Moheshur Sing v. The Bengal Government* (i), in which one of the questions considered was whether the Commissioners of Revenue were right in admitting a review of a decision in a resumption suit after the expiration of ninety days. The Judicial Committee say: "Before considering whether the review was granted in conformity with the Regulations, let us look a little to the principles upon which we think lapse of time is a most important consideration. In the present case five years and a half had passed away since the original decision. Surely, whatever may be the true import of the Regulations, the parties interested in the decision which had been made were entitled, after the lapse of a sufficient period—no appeal having been asserted, or petition for a review presented—to conclude that the Government acquiesced in what had been done by the Special Commissioners, and, in that rational conviction, to deal with the property upon the footing of the past decision."

These remarks apply equally to cases such as that now before us. We may remark that they are referred to in a case decided by the Full Bench of the Calcutta Court: *Shama Churn Chuckerbutty and others v. Bindabun Chundur Roy and another* (j), in which it was unanimously decided that the words in Sec. 378 of Act VIII. of 1859, "the order in either case, whether for rejecting the application or granting the review, shall be final," do not prevent an appeal in cases in which an application for review is improperly admitted after ninety days have elapsed. This decision goes even further than those which we have quoted on the subject of Sec. 119; for by Sec. 377 a Court is allowed a discretion as to the admission of an application after a certain time has elapsed, while Sec. 119 permits no such exercise of discretion.

(i) 7 Moo. Ind. App. 203.

(j) 9 Calc. W. Rep., Civ. R. 181. See also 11 Calc. W. Rep., Civ. R. 197, and 13 *Ibid.*, Civ. R. 436.

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Being, therefore, of opinion that we are justified by law in interfering with the order of the Subordinate Judge, if the defendants' application was made to him after the period allowed by law had expired, we have only to consider whether the application was so made. On this point we see no room for doubt. The Calcutta High Court has decided that the words "any process" in Sec. 119 mean the *first* process, issued against the defendant or his property: *Shaikh Gholam v. Shamsuondur Koonwaree* (k); *Shib Chunder Bhadooree v. Luckee Debia Chowdhraïn* (l); *Radha Binode Chowdhry v. Digamburee Dossee* (m). We see no reason to dissent from these judgments; and, interpreting the section in this manner, we find that Rámchandra's application was made long after the expiration of the period allowed by law, and, therefore, that the Subordinate Judge had not any jurisdiction to entertain it, or to make the order which he did make, and which the District Judge—erroneously, as we think—affirmed.

For these reasons the orders of the courts below, admitting Rámchandra's application, are reversed, and the original decree of the Subordinate Judge is restored.

Order accordingly.

Special Appeal No. 202 of 1866.

HABI RA'MCHANDRA *Appellant.*
 MAHA'DA'JI VISHNU *Respondent.*

Mortgage without Possession in the Konkan—Possession—Registration.

A mortgage in the Konkan without possession is invalid as against a subsequent mortgagee with possession, but the registration of such a mortgage cures any defect or imperfection arising from the non-completion of the transaction by delivery of possession; and a deed so registered is good against a non-registered mortgage though accompanied by possession. Previous cases reviewed.

THIS was a special appeal from the decision of W. M. P. Coghlan, Acting Joint Judge of the Konkan at Ratnâ-

(k) 7 Calc. W. Rep., Civ. R. 375. (l) 6 Calc. W. Rep., Misc. R. 51.

(m) 9 Calc. W. Rep., Civ. R. 236.

girl, in Appeal Suit No. 144 of 1865, reversing the decree of the Munsif of Rájápur.

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The special appeal was argued, on the 10th of August 1866, before TUCKER and GIBBS, JJ.

Dhirajlál Mathurádás for the appellant.

Bahiravnáth Mangesh for the respondent.

The judgment of the Court was delivered on the 10th of December 1867.

GIBBS, J.:—The plaintiff, Hari Rámchandra, brought this action to recover two-thirds of four fields which originally belonged to one Bhikáji Bacháji, whose interest he had purchased at a sale by a civil court, but which the defendant refused to surrender, on account of an alleged collusive mortgage.

The defence set up was that the mortgage was a *boná fide* transaction made previous to the sale, and that the mortgagee's lien must be paid off before the purchaser of the mortgagor's interest could obtain possession of the land.

The Munsif of Rájápur decreed that the plaintiff should recover the land on payment to the defendant of Rupees 1,461-9-0, with interest at the rate agreed upon.

The plaintiff, in appeal to the Joint Judge at Ratnágiri, urged that the mortgage was colourable only, and not made in good faith, and that it was invalid under Hindú law, owing to possession not having been given to the mortgagee. The Joint Judge (Mr. Coghlan) held that the mortgage was *boná fide*, and was not proved to have been completed by possession, but that it had long been decided that possession was not necessary to the validity of a mortgage in the Konkan, any more than in Gujarát, and that, consequently, the plaintiff could not recover the land without satisfying the claim of the mortgagee; but as his plaint was not to redeem, the Joint Judge varied the Munsif's decree, and rejected the claim altogether.

In special appeal it has been contended for the special appellant that, under the recent rulings of the High Court,

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which followed the precedents established by the late Court of Šadr Adálat, it had been held that in the Dakhan and in the Konkan possession was necessary, under Hindú law, to make a valid mortgage. A mortgage without possession would give no right against a subsequent mortgagee or purchaser with possession. The special appellant cites 2 Borradaile, page 147 (edn. of 1863), case 23; Frere, Selected Decisions S. D. A., page 187, case 39; Bellasis, Selected Decisions S.D.A., page 5, No. 1362; Morris, Selected Decisions, Part II., page 105; *Ibid.*, Part I., page 56, No. 2757; Harrington's Rep., Vol. VIII., page 189, No. 23 of 1861 (Konkan); *Ibid.*, p. 193, No. 24 of 1861 (Khándesh); Harrington's Rep., Vol. IX., page 499, No. 24 of 1860 (Southern Maráthá Country); S. A. No. 85 of 1865 (Couch, Tucker, and Warden, JJ.), Konkan (unreported); S. A. No. 970 of 1864 (Couch, Newton, and Warden, JJ.), Dakhan (unreported).

On the other hand, it has been urged for the special respondent that the mortgage in this case was registered, and that, therefore, it would be complete and effectual without possession, and create a lien against any subsequent purchaser of the mortgagor's interest: *Ram Buggut and another v. Sadanundrao Juggurnath (a)*.

We have taken time to consider our judgment in this case in order that we might review the authorities on the two questions which are raised in this special appeal, and, after examining all the decisions both reported and unreported which have been brought to our notice, we have come to the conclusion that the Acting Joint Judge was wrong in declaring that "it has long ago been decided that possession by a mortgagee is not necessary to a mortgage here" (i.e., in the South Konkan) "any more than in Gujarát," but that the decision which he ultimately came to was right, inasmuch as the deed of mortgage on which the defendant relies in this instance being registered, the defect which, under Hindú law, existed in the mortgagee's title, owing to the non-transfer of possession, was cured.

(a) Bellasis, Selected Decisions, p. 9, Case 1564.

The earliest decision on the subject of mortgages in the Mofussil of this Presidency is to be found in the case of *Tooljaram Atmaram v. Mean Moohumud and another* (b), in which it was held that, both under Hindú and Muhammadan law, possession was necessary to complete a mortgage, and that a mortgagee with possession was entitled to a preference over a mortgagee whose mortgage originated in a deed of prior date but who had never obtained possession. This decision was made in 1821, and the ruling was upheld in 1836 in the case of *Mahomed Khan v. Kerojee and Morajec* (c), also in the case of *Khundojee Hybutrao v. Balajee Dinnanath* (d), also *Dondce and Nana v. Suntram* (e).

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In the case of *Govurdhun Doolubdas v. Sukharam Ramchunder* (f) the Full Court held that in the Konkan a mortgage without possession is invalid as against a purchaser with possession, though, the Court observes, it would not be so in Gujarát.

The same doctrine was upheld in the case of *Chuttrajee Dullajee v. Krishna* (g), which was an appeal from the District Court in Khándesh.

In a later case (h), which came from the Dharwár district, a similar decision was arrived at. This concludes the authorities decided by the late Šadr Diváni Adálat.

Since the establishment of the High Court we find the doctrine upheld that possession was necessary to complete a non-registered mortgage in the Dakhan (i), while a similar decision with reference to the Konkan was arrived at by nearly the same Bench (j).

(b) 2 Borr., p. 147, Case 23.

(c) Frere's Selected Decisions S.D.A., p. 187, Case No. 39.

(d) Bellasis' Rep., p. 5. (e) Morris, Selected Decisions, Part I., p. 56.

(f) 8 Harrington, Rep. 189, S. A. No. 23 of 1861.

(g) 8 *Ibid.* 193, S. A. No. 24 of 1861.

(h) 9 *Ibid.* 499, S. A. No. 24 of 1860.

(i) S. A. No. 970 of 1864, decided on the 18th of February 1865 by Couch, Newton, and Warden, JJ.

(j) S. A. No. 85 of 1865, decided on the 12th of April 1865 by Couch, Tucker, and Warden, JJ.

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The above precedents show clearly that the Joint Judge was in error in holding that in the Konkan possession was not necessary to complete a mortgage; the only case which appears to the contrary is that of *Giriapa bin Hunmapa v. Nursapa Dewtee* (k), but, the facts of the case having been gone into, it appears that the decision only goes thus far, that possession by a tenant suffices. We have not quoted Gujarát cases, as they do not affect the present decision.

We now come to the precedents regarding the effects of registration, and the first case is that of *Rambuggut v. Sudanundrao* (l), in which it was held by the Full Court that a mortgage without possession when registered took precedence of a non-registered mortgage with possession; and in the case of *Govind Narayun v. Guneshram* (m) the Full Court upheld a subsequently registered mortgage against a prior unregistered mortgage on which a decree had been obtained; the High Court also held that a registered *miráspatra* was entitled to preference over an unregistered deed of a similar nature: *Harnamgir v. Spiers* (n). There are many other cases in which registration has been held to make a mortgage complete, whether accompanied by possession or not; and we, therefore, consider that we are only carrying out the views of the late Sadr and the present High Courts by holding in the present case that in the Konkan the registration of a mortgage without possession cures any defect or imperfection which arose from the non-completion of the transaction by delivery of possession, and that a deed so registered must be held good against a non-registered mortgage.

For these reasons we confirm the Joint Judge's decree with costs.

Decree confirmed with costs.

(k) Morris, Selected Decisions, Part I., p. 96, S. A. No. 2972.

(l) Bellasis, Rep. 9, S. A. No. 1564.

(m) Morris, Selected Dec., Part III., p. 13, S. A. No. 3170.

(n) 2 Bom. H. C. Rep. 204. (2nd edn.)

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*Special Appeal No. 19 of 1870.*1871.
Jan. 31.KRISHNA'PPA' valad MAHA'DA'PPA' *Appellant.*BAHIRU YA'DAVRA'V *Respondent.**Hindú Law—Mortgage—Possession—Priority—Possession obtained by subsequent Mortgagee pending suit by prior Mortgagee—Lis pendens.*

As a general rule, by Hindú law a mortgagee in possession is entitled to have his claim satisfied in preference to the claim of the holder of a mortgage of prior date unaccompanied by possession.

There are cases, however, which the Courts treat as exceptions to that general rule.

Thus where a prior mortgagee sued to recover possession of certain mortgaged premises from the mortgagor, and before judgment was given in that suit, a subsequent mortgagee filed another suit against the mortgagor and obtained judgment, under which possession was made over to him (the subsequent mortgagee); it was held that possession so obtained pending the earlier suit would not avail to give the subsequent mortgagee priority over the prior mortgagee.

The effect of a *lis pendens* in India considered.

THIS was a special appeal from the decision of S. H. Phillips, Acting Senior Assistant Judge of Solápur, in Appeal Suit No. 33 of 1868, amending the decree of the Munsif of Bársi.

The facts of this case were that one Hari Rájárám Joshi mortgaged a field (No. 9) to Krishnáppá valad Mahádáppá, the appellant, on the 29th of April 1860, without transferring possession of the land to him. Hari Rájárám Joshi afterwards mortgaged the same field without delivering possession of it to Bahiru Yádavráv, the respondent, on the 10th of April 1864. More than two years after this mortgage, the mortgagor mortgaged the same field a second time to Krishnáppá valad Mahádáppá on the 1st of August 1864. Part of the consideration for this second mortgage to Krishnáppá was stated to be the amount due under the first mortgage of the 29th of April 1860. This second mortgage to Krishnáppá was also without possession.

None of the mortgages appeared to have been registered.

Krishnáppá valad Mahádáppá sued Hari Rájárám on the mortgage-bond dated 1st of August 1864, and obtained a

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decree on the 16th of April 1867. Hari Rájárám Joshi, the mortgagor, defended the suit. Meanwhile, before decree was pronounced in this suit, Bahiru Yádavráv obtained an *ex parte* decree against Hári Rájárám on the 9th of November 1866, though he filed his suit subsequently to the suit instituted by Krishnáppá valad Mahádáppá. On the *ex parte* decree so obtained, Bahiru Yádavráv took out execution, and obtained possession of the field on the 1st of January 1867.

Afterwards Krishnáppá valad Mahádáppá applied for execution of his decree, obtained on the 16th of April 1867, and dispossessed Bahiru Yádavráv from the field, whereupon Bahiru Yádavráv filed this petition praying for possession under Sec. 230 of Act VIII. of 1859.

The defendant, Krishnáppá, answered that he had obtained possession of the field under a decree, and that, the land being mortgaged to him in the first instance before it was mortgaged to the plaintiff, he had a right to have his mortgage satisfied first. He also alleged that the plaintiff's mortgage and the *ex parte* decree and the execution thereon were collusive and fraudulent transactions.

By the terms of each of the decrees, the land was to remain in the respective mortgagee's possession till his mortgage-*lien* was satisfied.

The Munsif of Bársi rejected the petition of Bahiru, and held that the land having been mortgaged first to Krishnáppá bin Mahádáppá, he had a right to have his *lien* satisfied before the petitioner.

The petitioner, Bahiru Yádavráv, appealed from this order to the District Judge of Solápur, who, in amending the Munsif's decree, made the following observations:—

“Both the mortgage-deeds are held to be proved, and the question is whether Krishnáppá, having obtained possession of the land under a decree founded on a mortgage-bond executed subsequently to that on which the petitioner Bahiru obtained his decree, can retain possession so acquired by virtue of a mortgage-bond antecedent in date to that of the

petitioner, which has never been sued on, nor has possession been obtained under it.

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“My finding on this issue is in the negative: for as the debt due to Krishṇāppá under the first mortgage has been extinguished by the amount due thereon being entered in another deed as part of the consideration thereof, nothing was still due on the first mortgage-deed. As the petitioner's unsettled mortgage-deed was executed previously to the only mortgage-deed of Krishṇāppá which remains unsettled, he is entitled to be first satisfied from the land mortgaged.

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“I accordingly amend the Munsif's decree, and order that Krishṇāppá should satisfy the debt due to the petitioner secured on the land, and if the petitioner's claim is not so satisfied, he should receive possession of the land, and retain possession thereof till his debt is satisfied.”

The defendant, Krishṇāppá, appealed from this decision, and the appeal was this day argued before GIBBS and MELVILL, JJ.

Nánābhái Haridás for the appellant.

Shántáram Nárāyaṇ for the respondent.

Cur. adv. vult.

The judgment of the court was delivered this day by

MELVILL, J.:—This appeal was decided by us *ex parte* on the 22nd of June 1870, but, the respondent having shown that he was prevented by sufficient cause from appearing, we have set aside our judgment and readmitted the appeal.

The parties are rival mortgagees, the appellant having two mortgages, dated 29th April 1860 and 1st August 1864 respectively, while the respondent has an intermediate mortgage dated 10th April 1864. Neither party was put in possession by the mortgagor, and in 1866 they both sued the mortgagor for possession. The appellant's suit was instituted before that of the respondent, but his claim having been contested, while judgment in the respondent's suit was allowed to go by default, the respondent first obtained a

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decree, on which he sued out execution and was put in possession of the mortgaged property. Subsequently the appellant obtained a decree, and was put in possession by the court, and the respondent, having been dispossessed, made an application, which has been registered as a suit under Sec. 230 of Act VIII. of 1859.

The Senior Assistant Judge allowed the claim, on the ground that the appellant's first mortgage merged in and was extinguished by the second mortgage, and that, the latter mortgage being subsequent in date to the respondent's claim, the respondent's claim must be first satisfied. This decree we reversed, on the ground that the Senior Assistant Judge was in error in holding that any rights which the appellant might have under his first mortgage were extinguished by reason of his making a further advance on the security of the same property; and, now that the appeal is again before us, it is admitted by the respondent's Pleader that he is unable to support the Senior Assistant Judge's decree on the same ground on which it is founded.

But the respondent now takes up a new position; he contends that he had obtained possession of the mortgaged property under his decree, and that, in accordance with a long series of decisions in this court and the Şadr Diváni Adálat, he is, as mortgagee in possession, entitled to have his claim satisfied in preference to a mortgage of a prior date but unaccompanied by possession.

The first decision on this point which we have been able to find was passed in 1821 by the Şadr Diváni Adálat (2 Borr. 147). In that case, after consulting the Hindú and Muhammadan law officers, the Court found that, both by the Hindú and Muhammadan codes, the right claimed in virtue of joint possession and mortgage is of greater validity and effect than the mere circumstance of priority of mortgage without occupation. The rule laid down in that case has been, we believe, always followed, except when a departure from it has been rendered necessary by the provisions of the registration laws, or by some peculiarity supposed to be

inherent in *sán* mortgages in Gujarát. (The cases bearing on this subject will be found reviewed in the judgment of this Court in Special Appeal No. 202 of 1866 [a]). We are certainly not now disposed to question the correctness of a principle which has been adhered to by the court for half a century.

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But there are circumstances which may well induce us, while accepting the rule, to regard the present case as an exception to that rule. The respondent was a mortgagee in possession, but his possession was acquired during the pendency of the appellant's suit, which was founded on a prior title, and the object of which was to obtain possession of the same property. To what extent our courts should apply the maxim "*pendente lite nihil innovetur*" is a question which we believe has yet to be decided. Mr. Justice Story, in his work on Equity Jurisprudence, § 405, says : "Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. And, therefore, a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit." We might well hesitate to regard as conclusive such presumption as is here referred to, or to carry the doctrine of *lis pendens* to such an extreme. In England no *lis pendens* of which a purchaser has not express notice will now bind him unless the title of the cause, with other particulars, be registered ; but in this country, notwithstanding our elaborate system of registration, there is no provision for the registration of a *lis pendens*. Sec. 223 of Act VIII. of 1859 clearly recognises the doctrine of *lis pendens* to a certain extent. That section is as follows :—"If the decree be for a house, land, or other immoveable property in the occupancy of a defendant or some person on his behalf, or of some person claiming under a title created by the defendant subsequently to the institution of the suit, the Court shall order delivery

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thereof to be made by putting the party to whom the house, land, or other immoveable property may have been adjudged, or any person whom he may appoint to receive delivery on his behalf in possession thereof, and, if need be, by removing any person who may refuse to vacate the same."

Thus it appears that an alienee *pendente lite* is to be summarily removed, but on referring to Sec. 230, and comparing the wording of it with that of Sec. 223, it would seem reasonable to infer that the person so removed might, under certain circumstances, be reinstated in possession. The effect of the two sections taken together would seem to be that an alienation of property *pendente lite* is *primâ facie* fraudulent, but that if the alienee could show that he was a *bonâ fide* purchaser for valuable consideration without notice, or that in any other way he had an equity superior to that of the plaintiff in the suit, he might recover the property from which he had been in the first instance summarily removed. In the present case it is not necessary to express any decided opinion on this point, for the respondent has no equity in his favour, but the reverse. He gave no consideration for the completion of his title by possession. His mortgage was subsequent to that of the appellant, his suit was subsequent; and the circumstance that he was the first to obtain a decree against the mortgagor was due either to accident or to collusion.

It appears to us to make no difference in the present case that the respondent's title was created—or, to speak more correctly, perfected—not by the defendant in the pending suit voluntarily, but by a decree of court compelling him to do what he did. A court will not compel a person to do what he may not lawfully do, and if it be surprised or deceived into so doing, when it discovers it, it corrects its mistake. It seems clear from the subsequent conduct of the Subordinate Judge in the matter of the execution, that if he had known that the property was in litigation between the mortgagor and the appellant, he would not have put the respondent in possession at all. He would have made the appellant a party

to the suit between the respondent and the mortgagor, so that the titles of all the parties might be simultancously determined; or, if the decree had been already passed in favour of the respondent, he would have forborne to execute it until the suit between the appellant and the mortgagor had been decided. An alienation made by a defendant *pendente lite* is no more valid, because made under an order of court issued under a misapprehension of which he was the wilful cause, than it could have been if it had been made voluntarily.

On these grounds we shall adhere to our former decision, reversing the decree of the Senior Assistant Judge, and restoring that of the court of first instance.

Decree reversed.

under seal

J. R. 2 Rom. f. 127.

Special Appeal No. 455 of 1870.

April 13.

GOKALBHA'I MULCHAND *et al.* *Appellants.*

JHAVER CHATURBHUJ *at al.* *Respondents.*

Mortgage—Limitation.

In 1848 a *sán* mortgage was executed to the plaintiffs; in 1850 the plaintiffs obtained a personal decree against the mortgagor; in 1857 this decree was modified in appeal, and the claim was allowed against the mortgaged property. In 1854 the mortgaged property was sold to the defendants at a sale held by a Civil Court in execution of a decree obtained against the mortgagor by a third party, and possession was made over to them. In 1866 the plaintiffs applied for execution of the decree obtained by them in 1857, and attached the mortgaged property in the hands of the defendants. The defendants then came in under Sec. 246 of the Code of Civil Procedure, and the attachment was raised on the 26th of July 1866; and the plaintiffs within one year from that day sued to have their debt satisfied out of the mortgaged property.

Held that the plaintiffs' claim (they not having sued the present defendants within twelve years from the date of the mortgage or of the sale to the defendants) was barred by the law of limitation, Act XIV. of 1859, Sec. 1., cl. 12.

THIS was a special appeal from the decision of M. H. Scott, Extra Assistant Judge at Ahmedábád, in Appeal Suit No. 146 of 1867, confirming the decree of the Šadr Amín of Dhandhuká.

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One Trikam Pujá mortgaged a house in *sán* (without possession) to the plaintiffs. The mortgage-deed bore date the 4th of May 1848. In 1850 the plaintiffs sued the mortgagor to recover the sum lent on mortgage, and obtained a decree against him personally. From this decree the plaintiffs appealed, and on the 7th of February 1857 the appellate court gave a decree declaring the mortgaged property subject to the debt. In the meantime the property had been put up to auction by the civil court, in execution of a decree obtained by one Chhagan Bhagubháí against the mortgagor, Trikam. The present defendants, having purchased the property, were put in possession, and have ever since remained in possession. The plaintiffs did not apply for execution of their decree till some time in 1866, in the commencement of which year they made their application, and the property was attached. The defendants objected under Sec. 246 of the Code of Civil Procedure, and, the objection having been allowed, the attachment was raised on the 25th of July 1866. The plaintiffs, therefore, within one year from that day, brought this present suit to have their debt satisfied from the mortgaged property.

The Šadr Amín upon these facts gave a decree for the plaintiffs, and the appellate court confirmed that decree.

The special appeal was heard before GIBBS and MELVILL, JJ.

Nánábhái Haridás, for the special appellants :—The plaintiffs are mortgagees. Their mortgage was in 1848. They did not sue till 1867. Their suit is, therefore, barred.

Dhirajlál Mathurádás, Government Pleader, for the special respondents :—(1) The plaintiffs have sued within one year from the date on which the attachment was raised, and their suit is within time, under Sec. 246 of the Code of Civil Procedure. (2) The defendant's purchase was during the pendency of the suit against the original mortgagor, and is, therefore, bad. (3) The cause of action should be taken to have arisen to the plaintiffs on the day they obtained their decree against the mortgaged property, *i.e.*, on the 7th of February 1857. For these reasons the claim is not barred.

PER CURIAM :—The mortgagor's rights were sold in 1854 to the original defendants, and they have had possession ever since. In 1857 the original plaintiffs obtained a decree against the property mortgaged, but did not execute it for some years after, the property not having been attached until about 1866. The exact date does not appear, but on the 25th of July 1866 the attachment was removed by the court on the application of the original defendants under Sec. 246 of the Code of Civil Procedure; and on the 25th of July 1867 the present plaintiff was filed, in which it is prayed that the plaintiff's mortgage-lien be satisfied from the mortgaged property. But it has been held by this court that a mortgagee must sue, to make good his claim against the mortgagor, within twelve years from the date of the mortgage; and here the present suit is not brought until seventeen years after the date of the mortgage, and fourteen years after the sale to the original defendants. It is a *sún* mortgage; possession was with the mortgagor, and his possession was from the first adverse to that of the mortgagee. The Court are, therefore, of opinion that the claim in the present suit is barred, and they reverse the decree of the lower courts, and reject the claim, with all costs on the plaintiffs.

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Decrees reversed and claim rejected.

NOTE BY THE REPORTER.—On the same day another case was decided by the same Bench (S. A. No. 514 of 1870, *Karsan Bawa v. Jhaver Chaturbhuj et al.*). It was similar to the case above reported, with this difference, that the purchase by the defendant was in 1858, one year after the plaintiff's decree. The Court there said: "The defendants are bound by the decree of 1857, their purchase being subsequent to it; but as the decree could not, from efflux of time, be executed against the mortgagor, it could not be executed against them."

PER CURIAM :—The mortgagor's rights were sold in 1854 to the original defendants, and they have had possession ever since. In 1857 the original plaintiffs obtained a decree against the property mortgaged, but did not execute it for some years after, the property not having been attached until about 1866. The exact date does not appear, but on the 25th of July 1866 the attachment was removed by the court on the application of the original defendants under Sec. 246 of the Code of Civil Procedure ; and on the 25th of July 1867 the present plaint was filed, in which it is prayed that the plaintiffs' mortgage-lien be satisfied from the mortgaged property. But it has been held by this court that a mortgagee must sue, to make good his claim against the mortgagor, within twelve years from the date of the mortgage ; and here the present suit is not brought until seventeen years after the date of the mortgage, and fourteen years after the sale to the original defendants. It is a *sán* mortgage ; possession was with the mortgagor, and his possession was from the first adverse to that of the mortgagee. The Court are, therefore, of opinion that the claim in the present suit is barred, and they reverse the decree of the lower courts, and reject the claim, with all costs on the plaintiffs.

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Decrees reversed and claim rejected.

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June 6.

Special Appeal No. 419 of 1870.

BA' LKRISHNA' VITHAL *et al.* Appellants.
HARI SHANKAR *et al.* Respondents.

*Suit for Partition—Omission of Mortgaged Lands from Claim—
Subsequent Suit—Civ. Proc. Code, Sec. 7.*

The plaintiffs in 1863 sued the defendants for the plaintiffs' share in certain undivided family property, and did not include in their claim certain lands then in the possession of mortgagees, which lands had been mortgaged by one of the defendants as manager of the family. The defendants subsequently redeemed the mortgaged lands.

The plaintiffs then filed a suit to recover their share of the lands so redeemed.

Held that they were entitled to maintain such suit, as the mortgaged lands had not been available for an actual partition at the time of the former suit.

THIS was a special appeal from the decision of R. W. Hunter, Acting District Judge of Ratnagiri, in Appeal Suit No. 500 of 1867, reversing the decree of Vithal Vasudev, the Munsif of Vingorla.

The facts of the case were briefly these. The plaintiffs, Bal-krishna Vithal, Balvant Raghunath, and Venkatesh Vishvanath, sued Hari Shankar, Govind Gopal, and Ramchandra Govind for the recovery of a moiety of five *thikans* situate in Mouje Redi. The plaintiffs alleged in their plaint that these *thikans* had been parts of the undivided ancestral property of the family, and that the defendants had mortgaged them in the year 1824, and had again redeemed them in or after the year 1863. The defendants pleaded that a partition of the ancestral property had taken place in 1834, and that the *thikans* in question had been acquired by them after that partition. They also pleaded, as a bar to the plaintiffs' action, that the plaintiffs had not included these *thikans* in a previous suit (No. 195 of 1863) which they had instituted against the defendants for a partition of the family lands in the possession of the defendants. The court of first instance decided the suit in favour of the plaintiffs, and awarded them a moiety of the *thikans* claimed, on their paying to the defendants Rs. 443-7-6, the amount of half the expenses incurred in the redemption of the land.

*Followed in
Narayana &
12 Bom. H.C.
148. end?*

The defendants appealed to the District Judge of Ratnágiri, and urged, among other grounds, that as the claim had not been included in the plaintiff's former suit (No. 195 of 1863) it could not now be maintained. The Judge held the claim barred under the provisions of Sec. 7 of the Civil Procedure Code, and reversed the decree of the Munsif. The following extract from his judgment shows his reasons for the decision:—

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“Of the above objections, the 4th, as involving a question of jurisdiction, requires immediate notice, and, in my opinion, is a good one.

“The parties to this suit were precisely the parties in Original Suit No. 195 of 1863 (exhibit No. 31). In that suit the plaintiffs sought to recover their half-share of certain joint *thikáns* which had been mortgaged in 1823-24, and which were held to have been redeemed from mortgage in 1843. In the present suit it is sought to recover a half-share of five other *thikáns*, said to have been also mortgaged in union in 1823-24, but which were not redeemed from mortgage till after the former suit (Original Suit No. 195 of 1863) was instituted. It is now urged that the suit of 1863 was in fact a suit to enforce a share in land on the ground of its being joint family property. I find that such was the case, and that the High Court, in Special Appeal No. 558 of 1865 (dated 27th February 1866), treated it as a suit of that nature in applying Cl. 13, Sec. 1., Act XIV. of 1859 as the law of limitation applicable to it (see exhibit 87). This being so, I am of opinion that the suit of 1863 should have included the whole of the joint property that remained to be divided; that none of the joint property can be held exempt from the operation of this rule on the ground of its being held in mortgage at the date of suit; and that, as the plaintiffs omitted to include the *thikáns* now in dispute in the suit of 1863, the present suit is barred by Sec. 7 of Act VIII. of 1859.

“I, therefore, reverse the Munsif's decision, and throw out the claim with all costs on the plaintiffs.”

The special appeal was heard by WESTROFF, C. J., and WEST, J., on the 6th of June 1871.

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Bahiravnáth Mangesh, for the appellants:—The lower court has misconstrued Sec. 7 of Act VIII. of 1859 in holding that the provisions of that section prevented the maintenance of the present suit. As at the date of the former suit the respondents were not in possession of the property now claimed, the cause of action with respect to that property had not then arisen, and the District Judge, therefore, erred in applying Sec. 7 of the Code to this case.

Dhirajlál Mathurádas, for the respondents:—The former suit was a suit brought by the plaintiffs for a half-share of the family property in the respondents' possession. It might, therefore, be fairly presumed to be a partition suit. And, as the plaintiffs omitted to include in that suit the lands now claimed by them, the claim is barred by Sec. 7 of the Civil Procedure Code.

WESTROPP, C. J.:—It appears to this court that the suit No. 195 of 1863 does not operate as a bar to the present suit inasmuch as the five *thikáns*, the subject of the present suit, were, when the suit No. 195 of 1863 was instituted, in the possession of mortgagees, and not available at that time for an actual partition, whereas the five *thikáns*, the subject of Suit No. 195 of 1863, had then been redeemed and were in the possession of Hari Shankar, and were then available for partition. The possession of the mortgagees of the five *thikáns*, the subject of the present suit, would not have been such a possession as Hari could treat as a possession adverse to the plaintiffs. When he mortgaged those five *thikáns*, he did so as manager of a united family, of which the plaintiffs were co-members with him. Such a possession by the mortgagees should, in a Court of Equity, be regarded as a possession quite as much under the plaintiffs as under Hari. This court, therefore, reverses the decree of the District Judge, and remands this cause for re-trial on its merits. On such re-trial the following issues should be determined, together with any other issues which to the trying Judge may seem proper and necessary for the final adjudication between the parties:—

1st—Whether the five *thikáns*, the subject of this suit, formed part of the family property.

2ndly—Whether the said five *thikáns*, or any of them, or any part thereof, have ever been the subject of a partition, either by suit or otherwise, amongst the parties to this suit.

3rdly—When were the said five *thikáns*, or any of them, or any part thereof, redeemed by Hari or any of the defendants from the mortgagees thereof; and, incidentally to this third issue,

4thly—Whether this suit is barred by the law of limitation.

5thly—Whether in the event of the trying court being of opinion that the plaintiffs are entitled to recover a share or shares in the five *thikáns*, the subject of this suit, the plaintiffs are bound to compensate the defendant Hari to any and what extent in respect of the redemption of the same five *thikáns*, or any of them, or any part thereof, by him. And it is further directed that the trying court shall be at liberty to take such further evidence in this cause on such re-trial as aforesaid as may be necessary. Costs to abide the final result.

Decree reversed and case remanded.

L. J. & Bench

Special Appeal No. 22 of 1871.

June 12.

NA'THA'JI KRISHNA'JI.....*Appellant.*

HARI JA'GOJI.....*Respondent.*

Hindú Law—Adoption by Widow—Adoption of Married Man among Shúdrás—Gifts of Ancestral Property previous to Adoption.

According to the Hindú law obtaining in Western India, the adoption of a *Shúdrá* who is married at the time of his adoption is not invalid if the adopted person be a *sagotra* (of the same family) of the person adopting. A son adopted to her husband by a widow is entitled to set aside a gift of ancestral immoveable property made by his adoptive father's widow previous to his adoption.

THIS was a special appeal from the decision of R. F. Mactier, Judge of the District of Sátará, in Appeal Suit No. 38 of 1870, confirming the decree of the Subordinate Judge of Rahímátpur.

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The plaintiff, Hari, alleged that he was adopted by one Bálái, widow of Jágoji—a member of the Shúdrá caste, who owned a piece of land and a house; and that one Nátháji, who was in wrongful possession of them, would not give up his possession though requested to do so. The plaintiff, therefore, prayed that the court would eject the said Nátháji from the property in question.

Nátháji, *inter alia*, answered that the plaintiff had not been adopted, as alleged, and that the property had been given to him (Nátháji) in gift by the deceased.

The court of first instance held that the plaintiff had been adopted by Bálái, and that he was her heir, and that Bálái had no authority to make a gift of Jágoji's immovable property, and gave a decree in the plaintiff's favour.

The court of appeal upheld this decree, for the following among other reasons:—

“The adopting mother, Bálái, and the giver in adoption, Rávji, both say the plaintiff, Hari, was received and given in adoption; and the writer and the attesting witness, Nos. 22 and 23, prove having written and attested No. 14, the deed of adoption, which sets forth the facts; the giver is a cousin of the adopting widow's husband, and, as he is in the same *gotra*, this is all legal. As to the adopted son, Hari, being an eldest son, as alleged, this is not proved by the evidence; and as to an objection now made, that Hari is married and has children, I can find only one decision to the effect that the adoption of a married man is illegal; and this is a very old case of the Madras Sadr, dating A.D. 1823,* and the contrary doctrine is laid down at page 75 of Macnaghten, where he says: ‘But when a relation, or *sagotra*, is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family;’ he says this on the authority of the Mayúkha, at page 64 of which are the words ‘a married man, who has even a son born, may become an adopted son.’ I prefer the authority of this last to such an old decision as that quoted by Strange, and I have met

* See Strange's Hindú Law, Appx., p. 87.

with several cases in this district, unopposed, in which an adopted son was married and had a family: and I do not consider that a man's being married, with a family, will defeat the original object of his being adopted at all. And if his being married does not defeat this object, I can see no reason against his being so. I have looked over all the authorities on this point, the chief being the Dattaka Mīmāṃsā, and I can find no prohibition of such an adoption: so that, under

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Quod lex non vetat permittit. the rule which I quote in the margin, I must conclude that the adoption of a married man is valid, and that this adoption of the plaintiff was, therefore, strictly according to Hindú law."

The special appeal was heard by MELVILL and KEMBALL, JJ.

Bahiravnáth Mangesh, for the appellant:—The adoption of a married person is invalid by the Hindú law. After the performance of the Upanayana ceremony there can be no adoption: *P. Venkateshaiya v. M. Venkata Chárlu* (a); Dattaka Chandriká, Sec. II., para. 25 (b); T. L. Strange's Manual, para. 104, p. 27; Macnaghten's Hindú Law, Ch. VI., p. 75 (ed. of 1829); Cowell's Lectures on Hindú Law (1870), pp. 329–334; and cases collected in Norton's Leading Cases, p. 65. Marriage is, therefore, even amongst Shúdrás, an insuperable bar: Strange, p. 91; Norton's L. C., p. 76. The Dattaka Chandriká and Dattaka Mīmāṃsā are of universal authority, and their doctrines are not to be disputed. It is true that in the Vyavahára Mayúkha (CIX.), Ch. IV., Sec. V., pl. 19 (c), Nilkanṭha has quoted the authority of his father for the position that the adoption of a married man with even a son born is valid; but Nilkanṭha's father was not a Rishi, and his opinion is not authoritative.

The adoption of the plaintiff took place four years after the gift to the defendant, and, as it was made from corrupt motives in the widow, should be set aside: *Rakhmábái v. Rádhábái* (d). The doctrine of *factum valet* will not apply in the present case, as there is a direct prohibition to such

(a) 3 Mad. H. C. Rep. 28.

(b) Stokes' H. L. B. 642.

(c) Stokes' H. L. B. 64.

(d) 5 Bom. H. C. Rep., A.C.J. 181.

1871. an adoption : Steele's Customs, 176 ; *Balvantráv Bháskár v. Bayábái* (e).
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 HARI JA'GOJI. *Janárdhan Sakhárám Gádgil*, for the respondent :—The sole authority on which Norton, Strange, Macnaghten, and the Madras High Court rely is, as appears from the footnotes, a passage from the Káliká Purán quoted in the Dattaka Chandriká as well as in the Mayúkha, which is of greater authority in Western India. . But in the present case there is really no conflict among the authorities. The Dattaka Chandriká quotes the passage from the Káliká Purán at Sec. II., para. 25, but states that it is unauthentic. In paras. 26-32 the author points out that, even if the passage be authentic, its correct interpretation would not prevent a person upon whom the ceremony of tonsure and other rites of initiation are performed from being adopted; only a particular ceremony called “ the sacrifice for male issue,” would in that case have to be performed. In para. 33 it is distinctly said : “ And thus the practice of all the ancients, even in respect to the adoption of a son, unlimited to any particular time, is upheld.” The Dattaka Mímámsá's interpretation of the passage is the same as that of the Dattaka Chandriká. Nilkantha, the author of the Mayúkha, says that reliance is not to be placed upon the passage in question, “ because it is not to be found in two or three copies of the Káliká Purán” (f). Even if it were authentic, he says it applies to *asagotras* (of different *gotras*) only. On the other hand he quotes the express authority of his father for the position that a married man having children even can be adopted, and maintains the position to be reasonable, and not in opposition to the other authorities. Nilkantha's father, Shankar Bhat, though not a Rishi, is the author of *Dwait Nirṇaya*—a work specially intended, as stated in the work itself, for the Dakhan—the express object of which is to reconcile conflicting points of Hindú law.

For decided cases on the point see *Sree Brijbhookunjee*

(e) 6 Bom. H. C. Rep., O.C.J. 82.

(f) *Vyavahára Mayúkha*, Ch. IV., Sec. V., pl. 20—Stokes' H. L. B., p. 65.

*Maharaj v. Sree Gokoolootsacjee Maharaj (g); Ráje Vyan-
katráv v. Jayávantráv (h)*, in which the doctrine of *factum
valet* is distinctly affirmed to be applicable in a case like the
present.

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The following judgment of the court was delivered by

MELVILL, J.:—In this case we have to consider, whether the adoption of the respondent, Hari, by Bálái was valid, he having been at the time of the adoption a married man; and, if it be held valid, whether it invalidates a gift of ancestral immoveable property previously made by Bálái to the appellant, Nátháji.

It is contended that the adoption is invalid on the strength of a passage in the Dattaka Chandriká (Sec. II., § 29) which lays down that adoption must be performed previously to investiture in the case of persons of a regenerate tribe, and previously to marriage in the case of Shúdrás, to which class the parties to the present suit belong. Sir Thomas Strange (Manual, p. 91) considered that the rule would be more absolute in the case of Shúdrás than in those cases in which investiture is the criterion. "It would seem," he says, "as if there could be no adoption of one who is married; marriage not being capable, like tonsure and investiture, of annulment." So Mr. Norton, in his Leading Cases on Hindú Law (p. 76), relying on the same text of the Dattaka Chandriká, says: "An adoption made after the adopted son is married is clearly invalid," and he refers to two decisions of the Madras Sadr Diváni Adálat in 1814 and 1823. There appear to be no later decisions of the Madras or Bengal Courts directly bearing upon the point, but the Madras High Court has held, notwithstanding the doubts expressed by Sir T. Strange, that the doctrine of the Dattaka Chandriká, as regards Bráhmaṇs, is absolute, and that an adoption is necessarily invalid if made after the *Upanayana* has been performed in the natural family: *P. Venkatesarya v. M. Venkata Charlu and others (i)*.

(g) 1 Borr. 181, 196; 2 Borr. 92.

(h) 4 Bom. H. C. Rep., A.C.J. 191.

(i) 3 Mad. H. C. Rep. 28.

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On the other hand, the author of the Vyavahára Mayúkha seems to have been inclined to take an opposite view of the effect of marriage as an impediment to adoption: "and my father has said that 'a married man, who has even had a son born, may become an adopted son.' This also is reasonable, for it is not in opposition [to other maxims]." Macnaghten (p. 75) says: "According to the Mayúkha, an authority of the greatest eminence among the Mahrattas, the restriction as to age relates only to cases where no relationship subsists: but when a relation, or Sagotra, is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family." And other authorities on this side of India are, so far as they go, of the same tendency. In a case of great importance, *Sree Brijbhookejee Maharaj v. Sree Gookoolootsaojee Maharaj*, reported in 1 Borr. 181 (ed. 1825), the opinion of the Pandits was that "when a relation is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family, provided he possess common ability, and is beloved by the person who adopts him," and the court upheld the adoption. The opinion of the Shástris in that case was recognised as an authority (though on another point) by this court in *Rakhmábái v. Rádhábái* (j). In *Ráje Vyankotráv Anandráv Nimbálkar v. Jayávantráv bin Malhárráv Rána-dive* (k) an adoption was objected to, among other reasons on the ground that the person adopted was, at the time of his adoption, a father, and possibly a grandfather. But the court refused to set aside the adoption, holding, on the principle of *factum valet*, that such an adoption, if once made, must stand. Independently of the Hindú law, we think that there is sufficient authority for holding that such adoptions are in the Dakhan recognised by the custom of the country. Mr. Steele (Law and Custom of Hindu Castes in the Dekkan), p. 44, says, speaking of the law: "The Poona Sastrees do not recognise the necessity that adoption should precede Moonj and marriage," though subsequently, speaking of existing customs, he says the adoptee "should be

(j) 5 Bom. H. C. Rep., A.C.J. 181. (k) 4 Bom. H. C. Rep., A.C.J. 191.

adopted previously to the performance of his Moonj or marriage, at least if not a near relation" (p. 182). In the judgment now appealed against, the District Judge says: "I have met with several cases in this district, unopposed, in which an adopted son was married and had a family;" and he might have added that in the present case the idea of disputing the adoption on this ground did not even occur to the appellant until the hearing of the appeal.

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Upon a review of all the authorities, we think that we are justified in holding that in Western India the adoption of a *sagotra* or relation (as the respondent Hari was) is not invalid because the person adopted was married at the time of the adoption.

The adoption being held valid, the adopted son has, we think, the right to set aside a gift of ancestral immoveable property made by his adoptive father's widow previous to his adoption. In the case already referred to (l) it was held that an adoption by a widow has a retrospective effect, and, relating back to the death of the deceased husband, entitles the adopted son to succeed to his estate. In *Ranee Kishenmune v. Rajah Oodwunt Singh* (m) it was held that, according to the Hindú law, a boy adopted by a widow with the permission of her late husband has all the rights of a posthumous son, so that a sale by her, to his prejudice, of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity. In *Bamundoss Mookerjee v. Mussamut Tarinee* (n) (in which the decision of the Bengal Sadr Diváni Adálat was adopted without qualification by the Privy Council), the Judges, referring to that case, said: "In that case the son, when adopted, became the undoubted heir, and it was of course the correct doctrine that no sale made by a widow, who possesses only a very restricted life-interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances

(l) *Ráje Vyankatráo Anandráo Nimbálkar v. Jayávantráo bin Malhár-ráo Ránadive*.

(m) 3 Beng. S. D. A. Rep. 228.

(n) 7 Moo. Ind. App 169.

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of strict necessity." In the Maráthá Country it is not necessary that a widow should have the permission of her husband to an adoption, provided that the act is done by her in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive: *Rakhmábái v. Rádhábái* (*suprà*). In the present case, the person adopted seems to be the person who would have inherited the estate after Bálái's death; so that, even if there had been no adoption, the gift to Nátháji would have been invalid, as against him, after Bálái's death. Nátháji has, in the courts below, contested the adoption on the ground either that Hari was an eldest son, or that he was married, and not on the ground that the adoption was made capriciously or from a corrupt motive. Under these circumstances we see no reason why the doctrine laid down in *Ranee Kishenmunee v. Rajah Oodwunt Singh* should not be applied, and the gift by the widow treated as invalid against the adopted son. We, accordingly, confirm the decrees of the courts below.

KEMBALL, J., concurred.

Decree confirmed with costs.

GIRDHAR RANCHODDA'SAppellant.

HAKAMCHAND REVA'CHAND.....Respondent.

Purchaser of Land for Value—Prior Sankhat—Bona fides.

The plaintiff in 1866 obtained a decree against one Ramzán Mohidín for payment of a debt by him personally, or in default entitling the plaintiff to recover the amount from the sale of certain immoveable property situated in Gujarát on which the debt had been secured under a *sankhat*.* On the attachment of the immoveable property in execution of that decree, the defendant objected under Sec. 246 of the Civil Procedure Code, and alleged that he had purchased the property in 1865. The attachment having, accordingly, been raised, the plaintiff sued for a declaration of his right to sell the mortgaged property. Both the lower courts threw out the plaintiff's claim.

On special appeal, the decrees of the lower courts were reversed, and the case remanded for the trial of the issue whether the defendant was a *bona-fide* purchaser for valuable consideration without notice of the plaintiff's *sankhat* or lien on the property in dispute at or before the time of his purchase.

THIS was a special appeal from the decision of M. H. Scott, Extra Assistant Judge at Ahmedábád, in Regular Appeal No. 174 of 1870, confirming the decree of the Subordinate Judge.

In 1866, the appellant, Girdhar Ranchodás, sued one Ramzán Mohidín and others on a *sankhat*, dated 24th August 1863, and obtained a decree (No. 1295 of 1866) against them for the payment of the amount claimed, or in default to recover the same from the sale of the immoveable property (three houses) mortgaged by the *sankhat*. The property, accordingly, was attached in execution of that decree. The attachment, however, was raised on the application of the respondent, Hakamchand Reváchand, under Sec. 246 of the Civil Procedure Code. Hakamchand based his claim to the attached property on a deed of purchase dated the 27th of July 1865. Girdhar, therefore, brought the present action against Hakamchand for the purpose of having his right to sell the property declared. The Subordinate Judge of Ahmedábád threw out his claim, and his

*The word *sankhat* means in Gujarát a mortgage unaccompanied with possession.

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decision was affirmed on appeal by the Assistant Judge, who delivered the following judgment :—

“ The point for decision is whether or not the plaintiff has a right to sell the property in dispute in satisfaction of his decree.

“ I am of opinion that the plaintiff cannot execute his decree upon this property.

“ I do not consider that there is any ground for considering the defendant's deed of sale fraudulent, though there is not much proof on account of it; but it is registered, and there is no reason shown for believing it otherwise than good. Nor is it shown that the defendant knew of the plaintiff's *san*, and even if he did, that would not invalidate the sale.

* * * * * The decree which he seeks to execute was given, I find, not after a full trial, but upon an agreement between the parties. As the sale to the defendant was made in July 1865, and the decree was not passed till November 1866, it may very well be that the judgment-debtor—the vendor—would agree more readily to a decision knowing that he had parted with the property. I do not agree to the objection that this decree can be considered a *res inter alios acta*; but I do not think execution will lie against this property. The decree, in terms of the agreement, orders that, the claim being for Rs. 339, the defendant pay to the plaintiff Rs. 389, and that if he do not pay, the defendant is to be liable in person and property, and the *san* property is to be also liable. It has been held that when a person to whom property has been pledged for a debt, obtains a simple money-decree against the debtor, he cannot execute his decree against the property pledged to the prejudice of a subsequent *bonâ-fide* purchaser. Much more so, then, he cannot execute it to the prejudice of a purchaser prior to the decree; and I consider this decree must be held to be in fact a simple money-decree, since it is not distinctly against the *san* property, which is the last of the securities. Moreover, the *san* was to be held in abeyance till the judgment-debtor made default. The latter in fact made prospectively a new *san*, the old one being extin-

guished by the decree to all intents and purposes. * *
 * * I reject the plaintiff's claim, and affirm the
 decision of the lower court with costs."

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Against this decision, the plaintiff, Girdhar Ranchoddás, preferred a special appeal, which was heard before WESTROPP, C.J., and KEMBALL, J., on the 15th of June 1871.

Dhirajlál Mathurádás, for the special appellant:—The plaintiff's *san* being prior to the defendant's purchase of the property, the defendant was bound to satisfy the plaintiff's prior lien thereon. The lower court has omitted to raise and determine one important issue in the case, namely, whether or not the defendant purchased the property in question with knowledge of the defendant's prior mortgage-lien.

Nagindás Tulsidás for the special respondent.

WESTROPP, C. J.:—We are of opinion that the Assistant Judge should have framed an issue as to whether or not Ramzán Mohidín (the defendant in Suit No. 1295 of 1866) duly executed to the present plaintiff, Girdhar Ranchoddás, the *sánkhat* (mentioned in the plaint in this suit) for valuable consideration ; and the Assistant Judge should have caused that *sánkhat* to be produced by the plaintiff in this suit, and if the same has been filed as an exhibit in the suit No. 1295 of 1866, should have had it removed from the record of that suit to the record in this suit. If that *sánkhat* duly pledged the immoveable property (three houses) mentioned in the plaint to the plaintiff, the decree in the suit No. 1295 of 1866 could not extinguish it or merge it. On the other hand, that decree could not affect the present defendant, as he was not a party to that suit. The present suit, though somewhat informally framed, must in fact be regarded as a suit to establish the *sánkhat* as against an alleged purchaser, namely, the present defendant ; and if the *sánkhat* were duly executed for valuable consideration, and the defendant were not a purchaser for valuable consideration, or, even if a purchaser for such consideration, had notice of the *sánkhat* at or before the date of his purchase, the

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plaintiff is entitled to a decree in the nature of a decree for foreclosure and sale of the property, with costs. If, on the other hand, the defendant in this suit were a purchaser for valuable consideration without notice of the *sánkhat* at or before the time of such purchase, the decree should be for the defendant, on whom, it should be observed, lies the *onus* of proving that he so purchased without notice of the plaintiff's *sánkhat* or lien. Whether or not, under the circumstances of the case, such decree should be with costs of this suit other than the costs of this appeal (for which we shall now specially provide), the court below should duly consider according to the equity of the case. The Assistant Judge erred in holding that the decree in Suit No. 1295 extinguished the *sánkhat*, and also erred in not framing an issue and determining whether or not the defendant in this suit was a purchaser for valuable consideration without notice of the plaintiff's *sánkhat* or lien on the property at or before the time of his payment (if any) of the alleged purchase-money to Ramzán Mohidín. This court reverses the decrees of the courts below, and remands this cause for re-trial on the merits, subject to the foregoing observations. In such re-trial, the above-suggested issues, as well that concerning the plaintiff's *sánkhat*, as those concerning the defendant's deed of purchase, should be respectively framed and determined, and such other issues (if any) as may to the trying court seem necessary. The parties are to be at liberty to put in such further documentary and oral evidence as may, under the circumstances, be proper and necessary. In the event of the plaintiff's success on such re-trial, he will be entitled to recover from the defendant his costs of this appeal, and such other costs as the trying court may properly award to him. But in the event of the plaintiff's failing on such re-trial, he is to bear his own costs of this appeal, and is not to be charged with the defendant's costs of this appeal. Any other costs of this suit are, in the latter event, to be in the discretion of the trying court.

Decrees of the lower courts reversed, and case remanded.

*Special Appeal No. 613 of 1870.*1871.
June 21.FA'TMA' BIBI', widow of Muhammad Ali. *Appellant.*THE COLLECTOR OF SU'RAT.....*Respondent.**Act VI. of 1857—Award—Appointment of Arbitrators—Joint Judgment of Arbitrators.*

The separately recorded opinions, on different dates, of arbitrators (appointed, under Act VI. of 1857, to assess the value of land taken for a public purpose) who have never met or consulted together, do not constitute an award under the Act. An award to be good must contain the *joint* judgment of the arbitrators up to the latest period previous to the execution of the award.

Where a suit for the recovery of land taken, or compensation for being deprived of it, was filed *after* the expiration of three months from the date of an award, and the Court held the award to be null, the Court, following the procedure laid down in Sec. 31 of Act VI. of 1857, referred the parties to a fresh arbitration.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District of Súrat, in Appeal Suit No. 108 of 1870, confirming the decree of the Assistant Judge at that place.

It was heard before GIBBS and WEST, JJ.

Nánábhái Haridás appeared for the special appellant.

Dhirajlál Mathurádás, Government Pleader, for the Collector of Súrat.

The facts sufficiently appear from the following judgment:—

GIBBS, J.:—The question before us in this special appeal arises out of proceedings taken under Act VI. of 1857 in Súrat. It appears that, land being required for some public purpose in that city, a notice, signed by the Secretary to Government, appeared in the *Government Gazette* stating that some land and a building belonging to the original plaintiff were required for a public purpose. As she and the officer appointed on behalf of Government could not agree as to the amount of compensation, arbitrators were appointed under the Act,—Mr. Motirám Dalpatráam on behalf of the Government, and Mr. Sálím Muhammad on behalf of the plaintiff. These gentlemen made several fruitless attempts

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to appoint a third arbitrator under Sec. 12 ; but at length a Mr. Kelly was appointed.

It appears that the arbitrators never met or consulted or even viewed the property together ; but the plaintiff's arbitrator recorded his opinion, under date the 24th of February 1869, that he considered the compensation to be awarded for the property should be Rs. 1,800. The Government arbitrator, under date the 16th of March following, recorded his opinion that Rs. 800 would be sufficient ; and, on the 6th of May next, Mr. Kelly, the third arbitrator, indorsed his opinion on the same paper as that on which the Government arbitrator had written his opinion, that Rs. 800 was the correct valuation to be given.

No formal award was made or signed. The Collector tendered Rs. 800 to the original plaintiff, who refused to receive it, and filed a suit against him for recovery of the premises or Rs. 2,000 compensation. This suit was filed two days after the expiration of three months from the date of Mr. Kelly's opinion, three months being allowed as the limit within which a suit to reverse or alter an award may be made.

The Assistant Judge and the District Judge both found that the award was good, and that Rs. 800 was a fair price, and they visited the original plaintiff with costs.

In special appeal Mr. Nánábhái Haridás, for the special appellant, contended that although he could not ask to have the award reversed or altered, yet he could ask us to decide whether there was an award in accordance with the Act or not. He argued that there was no award at all.

The Government Pleader, on the other side, argued that although very irregular proceedings had been taken, yet that the opinions of the Government and third arbitrator amounted to an award.

The court has to consider in this case whether the special appellant has upheld her objection of "no award" or not. It is a purely technical point, and one on which the decisions of the English Courts appear at first sight not always reconcile-

able. We must in this case take the language of the Act and see what was intended—what was the submission, what the award, which the Act provides. The sixth section provides that in case the party and the Collector cannot agree as to the compensation to be allowed, “the matter shall be referred to the determination of arbitrators, to be appointed in the manner hereinafter provided.” This is laid down in Sec. 10, where the Collector and the claimant are each to appoint an arbitrator; and these two must, by Sec. 12, “before they enter upon the matter referred to them, nominate and appoint by writing a third person to act with them as arbitrator.” The 20th section then provides that “on the close of the inquiry the arbitrators, or a majority of them, shall deliver a full and complete award in respect of the matter referred to them.” And under Sec. 23 every person interested therein shall “be entitled to a copy of the award on plain paper.” Now it appears from the above that the three arbitrators must act together; that the first two cannot act until they have appointed a third; that a formal award, duly drawn up and signed by the three arbitrators, or a majority of them, is required; and generally that the arbitrators appointed under the Act are, as to their duties, bound by the ordinary rules regarding arbitrators.

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Now amongst the English cases on this subject there is one which appears to us to exactly meet the present case. We refer to the case of *Wade v. Dowling* (a), in which three arbitrators having been appointed,—one each by the parties, the third by the two first appointed,—made an award signed by two out of the three. One, who drew up the award, signed it in London and then posted it to the other at Bristol, who there executed it and returned it to his co-arbitrator in London, who published it. The point of whether this was “no award” was reserved by the court in the trial at *Nisi Prius*, and was argued before a Full Bench composed of Coleridge, Wightman, Erle, and Crompton, JJ., who unanimously held it to be no award. In giving judgment,

(a) 4 E. & B 44.

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Coleridge, J., observed:—"The Courts are bound to give to the parties what they stipulate for as the condition of their submission. The parties say: "We refer this matter to three arbitrators; we wish to have the opinion of all the three—at any rate the opinion of two—'up to the last moment;'" and the learned Judge further mentioned the case of *Stalworth v. Inns* (b), in which it was well pointed out that something might occur at the last moment to change the opinion of an arbitrator, and, therefore, the Court held the necessity of the award being executed by the arbitrators *simul et semel*.

Erle, J. (afterwards Chief Justice Erle), said even more clearly: "This is not the award for which the submission stipulates. That was to be an award made upon the joint judgment of arbitrators considering all they had heard up to the giving of their judgment. If an execution at two different places were held good, we should get to what seems in fact to have been made here—an award by one arbitrator conditional upon the assent of the other; this is not a joint award."

These observations apply exactly to the present case. It is true that here there was not a voluntary submission, but there was a reference prescribed by law, and in such a case the course directed by the law must be strictly pursued.

There is also a further irregularity, which we think renders the award null. The Act requires that before the two first-appointed arbitrators "enter upon the matter referred to them" they shall nominate a third arbitrator.

In this case we have it clearly on the record that not only did both the Government arbitrator and that of the original plaintiff enter upon the matter referred, but actually each separately recorded his opinion (and that without ever meeting or consulting) before the third arbitrator was appointed.

We have, therefore, no hesitation in holding this to be no award.

It now becomes a question what decree must follow this decision. It appears that under the Act the question of the

(b) 13 M. & W. 469.

land being taken for a public purpose cannot be questioned, neither can the Collector's act in taking possession. And we think, therefore, that, having held the award to be null, all we can do is, following the analogy of the procedure laid down in Sec. 31, to refer the parties to a fresh arbitration.

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As to costs, it is clear that the arbitrators of both parties have failed in their duty ; but we think that while there may be an excuse for the plaintiff's arbitrator, there can be none for Government, whose officer, exercising the powers vested in him by Sec. 16 of the Act, should have seen that the arbitrators did their duty in accordance with the Act which Government was putting into force. We think, therefore, that each party should pay his or her costs in the first and second courts, and that Government should pay those in this special appeal.

Decrees of lower courts reversed.



Special Appeal No. 603 of 1870.

June 29.

BA'I SU'RAJ *Appellant.*

THE GOVERNMENT OF BOMBAY and BA'PU-

BHA'I KHUSHA'LDA'S *et al.* *Respondents.*

Special Appeal No. 609 of 1870.

BA'PUBHA'I KHUSHA'LDA'S *et al.* *Appellants.*

BA'I SU'RAJ and THE GOVERNMENT OF

BOMBAY *Respondents.*

Majmudári Watan—Female's right to inherit—Assignment of entire Proceeds to Officiator—Act XI. of 1843, Sec. 13—Reg. XVI. of 1827, Sec. 20, Cl. 1.

Since the passing of Act XI. of 1843 a female can inherit a *majmudári watan*.

The Collector can assign the whole proceeds of a *watan* to the officiating person, who is entitled to retain such proceeds as his remuneration.

THESE were special appeals from the decision of W. H. Newnham, Acting District Judge of Súrat, in cross-appeals Nos. 88 and 103 of 1870, amending the decree of George Ayerst, Assistant Judge.

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The plaintiff, Bái SúraJ, sued the Collector of Súrat, as the representative of the Government of Bombay, and Bápubháí and others, to establish her right to a *majmudári watan*, and to recover six years' arrears of its emoluments (from Samvat 1920 to 1925—A.D. 1864 to 1869), alleging that the *watan* was entered in the name of her father, who received the allowance down to his death, in 1857; that thereafter her step-mother received it until her death, in 1859, and that since that year it was wrongfully entered by the Collector in the names of Bápubháí and others.

The Collector answered that there was no right of action against him; and that, as the *watan* was a service *watan*, the plaintiff could not claim arrears, under Sec. 13 of Act XI. of 1843.

The other defendants stated that there being no right of action against the Collector there was none against them; that the claim was barred by the law of limitation; that it could not be sustained, by virtue of an agreement passed by the plaintiff's father; that a female could not succeed to a *watan*; and that the remuneration paid by the Collector to the person who officiated should have been deducted from the arrears claimed by the plaintiff.

The court of first instance awarded her entire claim to the plaintiff.

The Collector and the other defendants appealed separately to the District Judge, who held that the claim was not barred; that the plaintiff, though a female, was entitled to succeed; and that the arrears, *minus* what had been paid to the officiator, should also be paid to her.

Against this decree two special appeals were preferred. The plaintiff in Special Appeal No. 603 appealed on the ground that the deduction made by the District Judge ought not to have been made; and the defendants, Bápubháí and others, in Special Appeal No. 609, objected to the entire decree.

The special appeals were heard by MELVILL and KEMBALL, JJ.

Shántáram Náráyan, for the plaintiff (appellant) :—This is a suit in the nature of a suit for damages against the Collector in respect of pecuniary loss sustained by the plaintiff. The defendants Bápabhái and others are trespassers, and are liable for all they have received. The *whole* of the proceeds of the *watan* could not, under Act XI. of 1843, be given to an officiating person.

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Dhirajlál Mathurádás (Government Pleader), for the Collector:—The plaintiff's suit is not for damages. She is making a new case. The Collector's action in the matter simply was that he in 1860 ordered that the proceeds of the *watan* should be paid to the person who performed the duty of *majmudár*.

Nánábhái Haridás, for the defendants Bápabhái and others :—The plaintiff, being a female, has no right to succeed. The late Şadr Diváni Adálat so interpreted the law, as appears from their decision of the 19th of May 1832.*

With regard to the plaintiff's appeal (No. 603), Mr. Justice MELVILL, in delivering the judgment of the court, said :—On a comparison of the plaint with the statement of the plaintiff's *vakíl*, exhibit No. 24, we think it clear that this suit was never intended to bear the complexion which the plaintiff's counsel now endeavours to give to it, namely, that of a suit for damages against the Collector in respect of pecuniary loss sustained by the plaintiff. If that were intended to be the nature of any part of the claim, then we can only say that so much of the claim is, against the Collector, barred : for the so-called tortious act which caused the loss, namely, the recognition of the defendants as proprietors of the *watan*, occurred in 1859. As against the other defendants, the same consideration to a certain extent applies. If the claim be for damages for a tortious act, then the claim is barred, for the tortious act was the obtaining of the estate, which took

* Sec. 20 of Reg. XVI. of 1827. It was ruled that, the spirit and letter of the Regulation as here laid down providing for the emolument being strictly considered as the official remuneration of the person filling the office, a female could not hold a *majmudári watan* : Şadr Diváni Adálat, 19th May 1832, *In re Mt. Gulab v. Abheram and others*.

1871.
 BA'I SU'RAJ
 v.
 GOVERNMENT
 OF BOMBAY
et al.
 ———
 BA'PUBHA'I
 KHUSHA'LDA'S
et al.
 v.
 BA'I SU'RAJ
 &
 GOVERNMENT
 OF BOMBAY.

place in 1859. If, on the other hand, the claim be for mesne profits, or for money had and received to the plaintiff's use, then it is open to the objection that no money was in point of fact, so far as appears on the record, received by any of the defendants. The whole proceeds of the *watan* were, by order of the Collector, paid to one Tápidás, as officiating officer, and he has not been made a party to the suit. Tápidás had a legal right to retain the whole proceeds as against the defendants, and there is nothing to show that he did not do so. The plaintiff's counsel has urged that these are merely technical objections, and that equity and justice are in his client's favour. We do not think that it is so as regards that portion of her claim which relates to the proceeds of the *watan* for the years 1864 to 1867. During these years the whole of the receipts were paid for the service rendered, and were certainly not more than sufficient to remunerate the officiator for the performance of those services. The plaintiff during these years never thought it worth while to come forward, being no doubt perfectly well aware that she could not perform the service herself, and that if she appointed a deputy the Collector would assign to him all the proceeds of the *watan*. In other words, she acquiesced in the performance of the service by Tápidás, and now, having had the benefit of the performance of that service, she wishes to deprive him of the remuneration, and herself to obtain the whole proceeds of the *watan* without having rendered any service for it. It is difficult to see how such a claim can be recognised as being in accordance with justice and equity.

This appeal must, therefore, be disallowed.

With regard to the appeal of the defendant Bápubháí (No. 609) against the plaintiff and the Collector, we hold, as appears to have been held in *The Government of Bombay v. Dámodhar Parmánandás et al.* (a), that, since Act XI. of 1843 was passed, a female can inherit a *majmudári watan*, and that the Šadr Diváni Adálat's * interpretation of 19th May 1832 is no longer operative. The reason for that inter-

(a) 5 Bom. H. C. Rep., A. C. J. 202.

* *Vide supra*, p. 85, in *notis*.

pretation, namely, that the allowance must be regarded as strictly the official remuneration of the person filling the office*—Sec. 20 of Reg. XVI. of 1827—is no longer applicable, now that a female is allowed to appoint a deputy to perform service, and *à fortiori* it is inapplicable in cases like the present, in which no service is to be performed at all. As to the question of custom, the Judge has found on the evidence that no custom excluding females exists. It is no answer to this to say that it is shown that such custom did exist previously to 1843. Custom ordinarily follows the law, and so long as a female could not succeed by law, it almost necessarily followed that she could not succeed by custom. As to the exhibit No. 8, it is sufficient to say that, although the Judge has not referred to it, there is no reason to believe that he did not consider it, and it is not binding on the plaintiff either as an admission or as an agreement.

We, therefore, confirm the decree of the District Judge.

Decree affirmed.

Special Appeal No. 142 of 1870.

July 6.

KESHAV HARKHA' *Appellant.*

GANPAT HIRA'CHAND *Respondent.*

Privacy—Invasion of Privacy—Custom of Gujarāt—Opening of Windows overlooking Neighbour's Premises.

Where a window opened by the defendant commanded a view, not of the plaintiff's private apartments, but of an open courtyard outside his house, it was held that there had been no invasion of the plaintiff's privacy which would entitle him to have the window closed, according to the custom legally recognised in Gujarāt.

THIS was a special appeal from the decision of M. H. Scott, Extra Assistant Judge at Ahmedábád, in Appeal No. 77 of 1868, reversing the decree of the Principal Šadr Amín of Ahmedábád.

* "The allowance so derived by a sole proprietor or occupant of an hereditary district or village revenue office shall in future be considered strictly as the official remuneration of the person filling the office, and, as such, shall not be subject to alienation by any incumbent : " Sec. xx., cl. 1, Reg. XVI. of 1827.

1871.
BA'I SURAJ
v.
GOVERNMENT
OF BOMBAY
et al.
BAPU'BHA'I
KHUSHA'LDA'S
et al.
v.
BA'I SURAJ
&
GOVERNMENT
OF BOMBAY.

1871. The plaintiff sued to compel the defendant to close a window, which he alleged invaded his privacy.

KESHAV
HARKHA'

v.

GANPAT
HIRA'CHAND.

The court of first instance rejected the plaintiff's claim; but on remand from the High Court the Extra Assistant Judge in appeal awarded it.

The special appeal was heard by MELVILL and KEMBALL, JJ.

Nagindás Tulsidás for the special appellant.

Dhirajlál Mathurádás, Government Pleader, for the special respondent.

PER CURIAM :—In *Manishankar Hargovan v. Trikam Narai et al.*, Special Appeal No. 443 of 1866 (a), which may be taken to be the leading case on the subject of the exceptional privilege of privacy which the inhabitants of Gujarát have succeeded in establishing, the court described that privilege in the following terms :—“ A series of decisions, extending over a number of years, has settled the question that, in accordance with the usage of Gujarát, a man may not open new doors and windows in his house, or make any new apertures, or enlarge old ones, in a way which shall enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation, and in this manner to intrude upon that neighbour's privacy, and that an invasion of privacy is an infraction of a right, for which the person injured has a remedy at law.” We are certainly not disposed to extend the privilege further than it was carried in that case; and as it appears from the Assistant Judge's judgment in the present case that the window opened by the defendant looks, not into the plaintiff's private apartments, but into an open courtyard outside his house, we are of opinion that there has been no invasion of the plaintiff's privacy which will entitle him to have the window closed.

Decree of lower courts reversed, and claim disallowed.

(a) 5 Bom. H. C. Rep., A.C.J. 42. Vide also *Kavarji v. Bhai Jarr*, 6 Bom. H. C. Rep., A.C.J. 143.

Regular Appeal No. 12 of 1870.

1871.
July 17.

BHISTO SHANKAR PA'TI'L Appellant.

RA'MCHANDRA'RA'V RAGHUNA'TH JAHNA'GIRDA'R. Respondent.

*Cause of Action heard and determined—Res Judicata—Civ. Proc. Code,
Secs. 2, 7, 26, and 387.*

The plaintiff sued to recover certain land, on the ground that he had been forcibly dispossessed of it by the defendant. As the plaintiff did not prove the alleged dispossession his claim was rejected, but the Court suggested that he might recover in a fresh suit, treating the defendant as a trustee, and offering to make certain payments to him. The plaintiff then filed a fresh suit, framing it in the manner indicated by the Court.

Held that the latter suit, being based on a different cause of action from the former, was not barred, and that the question at issue between the parties was not *res judicata*.

THIS was an appeal from the decision of J. J. Saldanha, First Class Subordinate Judge at Dhárwár, in Original Suit No. 83 of 1868.

In 1862 the plaintiff instituted an action in the Court of the Principal Śadr Amín of Dhárwár to recover a piece of land, on the ground that the defendant had wrongfully dispossessed him of it. This action was filed in the Śadr Amín's Court at Hubli as Suit No. 504 of 1862, that is to say, after Act VIII. of 1859 came into operation; and the claim was disallowed, with an observation that the plaintiff might bring a fresh suit, resting his claim on the ground of breach of trust, and offering to pay to the defendant the rent, called *júli*. The Śadr Amín's decree was upheld by the Joint Judge in appeal, and by the High Court in special appeal. The plaintiff, therefore, in 1868, brought the present suit, on the grounds suggested by the Śadr Amín, in the Court of the First Class Subordinate Judge of Dhárwár, who held that it was barred by Sec. 2 of the Code of Civil Procedure.

The appeal was heard, on the 5th of July 1871, by MELVILL and KEMBALL, JJ.

Anstey (with him *Bahiravnáth Mangesh*), for the appellant:—The suit is not barred by Sec. 2 of Act VIII. of 1859. Mofussil Judges have no power to pass judgments *in rem*:

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PA'TI'L
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Kanhya Loll v. Radha Churn (a) ; Dagdu v. Kámble (b).

Sec. 2 of the Code must, therefore, be construed, not with reference to the subject-matter of the suit, but with reference to the parties and the particular cause of action involved: Broughton's Code of Civil Procedure, 4th ed., pp. 33 *et seq.* Under Reg. IV. of 1827, Sec. 25, which governed the first suit, it was quite competent to the plaintiff to sue again on a different cause of action, and, the Šadr Amín having given him permission to do so, the present suit cannot be barred. Under Sec. 387 of the Code of Civil Procedure, he is entitled to the benefit of the old Regulations.

Shántarám Náráyaṇ, contra :—If the principle of allowing plaintiffs to bring fresh suits for the same relief on different grounds be admitted, there would be no end to suits. In *Chinniya Mudali v. Pillai (c)*, Chief Justice Scotland says: "But I take it to be also clear, as a general rule, both on principle and authority, that when a question of right or title has been adjudicated on in a suit," as I submit has been done in the present case, "the bar of the judgment cannot be avoided by suing on a new form of claim, or on a ground of relief, which might have been, but was not, raised or determined in the former suit, if such claim or ground arises out of, and depends upon, the same right or title as that which was directly in question in the former suit." So Vice-Chancellor Wigram, in *Henderson v. Henderson (d)*, cited in the above case, says that "the plea of *res judicata* applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the *subject of litigation*, and which the parties, exercising reasonable diligence, might have brought forward at the time." Now the first suit brought by the plaintiff was an ejectment suit. An ejectment suit always implies that the defendant holds wrongfully as against the plaintiff; and so he alleged in that suit. He makes the same allegation in the second suit, and asks for the same relief. The sole question is, was not

(a) 7 Calc. W. Rep., Civ. R. 338.

(b) 2 Bom. H. C. Rep. 348.

(c) 3 Mad. H. C. Rep. 320.

(d) 3 Hare 115.

the plaintiff bound to show *all* his title, such as it was, in his first suit; and if he did not do it, was he not himself to blame? Sec. 7 of Act VIII. of 1859 provides: "Every suit shall include the *whole of the claim* arising out of the cause of action," &c. This has been held to apply to property not sued for. The effect of Secs. 2 and 7 is that the plaintiff is bound to bring forward the whole ground of claim for the relief he seeks for. This is the best test to determine the question—that the relief is identical in both the suits.

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DRA'RA'V R.
JAHAGIRDA'R.

The plaintiff cannot take advantage of Reg. IV. of 1827, Sec. 25, as there was no pending suit.

With regard to the permission granted by the Şadr Amín to file a fresh suit, I submit, an improvident and illegal permission does not enable a party to sue. [MELVILL, J.:—In *Watson v. The Collector of Rajshahye* (e) the Lords of the Privy Council said: "We have not been referred to any case, nor are we aware of any authority, which sanctions the exercise by the Country Courts of India of that power which Courts of Equity in this country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter:" p. 49.]

Anstey, in reply:—The respondent has fallen into the fallacy of confounding possession with title. The former suit was for possession alone. It was held by the Şadr Amín that in that action the present question could not be raised. His judgment is a disclaimer against the decision of any but the question of possession.

When a court of competent jurisdiction, in deciding upon a particular subject-matter, thinks it necessary to go into collateral facts for the purposes of its decision, its opinion on those facts is not conclusively binding in a subsequent suit, which relates to a different subject-matter: *Modhoo Ram v. Boydonath* (f).

To show that our second suit was pending in 1862, and that we are entitled to the benefit of the old law, I cite *Parrott v.*

(e) 3 Beng. L. R., P. C. C. 48. (f) 9 Calc. W. Rep., Civ. R. 592.

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 v.
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Ram Suhay Singh (g), in which it was held that a suit must be held to be pending, under Sec. 387 of Act VIII. of 1859, if anything remains to be done which might have been done under the old law, and a party in such a case is entitled to ask the court to proceed under the old law, inasmuch as the application of the new Code would deprive him of a right, in reference to the procedure of the case, which but for the passing of the Code would have belonged to him.

Cur. adv. vult.

July 17. MELVILL, J.:—We think that the Subordinate Judge was in error in holding that the cognisance of the present suit is barred by the decision passed in Suit No. 604 of 1862.

A reference to the record of that suit shows that it was instituted to recover the same land which is now in dispute, on the ground that the plaintiff had been forcibly dispossessed by the defendant. The Šadr Amín disallowed the claim, on the ground that the plaintiff had failed to prove the alleged dispossession; but he remarked that some of the evidence appeared to show that the defendant would be bound to restore the land on receiving payment of certain money, and that the plaintiff might bring a suit to recover the land on those terms. In appeal the Joint Judge laid down certain issues, on which he recorded no definite findings, and, after discussing the evidence in a manner unfavourable to the plaintiff, he concluded in the following terms: “If the plaintiff’s father gave up his share in the *watan* from inability to pay the *júdi*, and accepted 3½ *márs* for his support, it is to be observed that the plaintiff makes no allusion to these circumstances in the plaint or reply, but alleges that he was forcibly ousted by the defendant, Rámchandra. Of this last, however, there is no evidence, and from what is recorded in the case it does not seem that the plaintiff, Bhisto, has correctly represented his grounds of action; and I concur with the Šadr Amín of Hubli in thinking that the evidence is unsatisfactory, and that the claim is not proved, and I, therefore, direct that the decree be confirmed.” The Joint

(g) Cal. W. Rep., Vol. for 1864, p. 35.

Judge does not appear to us to have actually decided anything more than the Šadr Amín decided, but simply to have held that the plaintiff could not recover in that suit, because he had failed to make out the case stated in his plaint, namely, a forcible dispossession by the defendant.

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JAHAGIRDA'R.

The present suit is brought in the manner suggested by the Šadr Amín to recover the land from the defendant, as a trustee, on payment of certain *júdi* due to him.

Sec. 2 of Act VIII. of 1859 provides that "the Civil Courts shall not take cognisance of any suit brought on a cause of action which shall have been heard and determined by a court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim."

Sec. xxvi., cl. 4, of the Code shows clearly that the cause of action in the former suit was the alleged forcible dispossession by the defendant. In the present suit the cause of action (in the sense in which the term is used in the above section) is an alleged breach of trust by the defendant, and this cause of action was certainly not heard and determined in the former suit.

It may be that in the former suit the courts might have laid down an issue as to title, and have determined that the plaintiff had no title, or that the defendant had a title to the land. Such a decision would have been virtually a bar to the present suit,—not perhaps on a strict construction of the words of Sec. 2 of the Code, but on the general principle that the judgment of a court of concurrent jurisdiction, directly upon the point, is conclusive evidence between the same parties upon the same matter directly in question in another court. But in point of fact there was no such issue and no such decision, and the present suit cannot be held to be barred (the points at issue in it not having been decided), unless it be held that a man who brings a suit on one ground of action and fails is necessarily debarred from bringing another suit for the same thing on another ground of action. We cannot find any authority for so general a proposition as

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this. In *Hunter v. Stewart* (h), which was a case in which the relief sought was in substance the same, and all the matters of fact alleged in the second bill were known to the plaintiff at the period of the first, it was held that the principle of *res judicata* did not apply, because there was not the same ground of claim, or one of the same causes for relief. In that case Lord Westbury said: "It is a different equity. It is indeed true that the case made by the second bill must be taken to have been known to the plaintiff at the time of the institution of the first, and might then have been brought forward; and it may be said, therefore, that it ought not now to be entertained. But I find no authority for this position in civil suits; and no case was cited at the bar, nor have I been able to find any, in which a decree of dismissal of a former bill has been treated as a bar to a new suit asking the same relief, but stating a different case, giving rise to a different equity."

We think this case must be remanded for a decision on the merits, and that the defendant should bear the costs of this appeal.

Reversed and remanded.



July 17.

Regular Appeal No. 21 of 1869.

LA'LJI UKHEDA' *et al.* *Appellants.*

|.

JOWBA' DOWBA' and THE COLLECTOR AND

MAGISTRATE OF KHA'NDESH *Respondents.*

Jurisdiction—Order by Magistrate for removal of Building, &c. from public place—Suit to establish Right—Entertainment of Suit—Crim. Proc. Code, Secs. 308 and 311.

The concluding clause of Sec. 311 of the Code of Criminal Procedure, though it prevents the Civil Courts from entertaining a suit to restrain a Magistrate from carrying out an order made under Sec. 308, or a suit for damages against the Magistrate or any other person in carrying out such order in the manner provided by law, does not bar a person against whom such an order has been carried into effect from instituting a suit to prove that land declared by the Magistrate to be public is his private property.

THIS was an appeal from the decision of the Honorable G. A. Hobart, District Judge of Khándesh, in Suit No. 6 of 1868.

(h) 8 Jur. 317, 318.

The facts of the case were as follows :—

On the 9th of January 1867, the Magistrate of the District of Khándesh, under Sec. 308 of the Code of Criminal Procedure, ordered the plaintiffs, Lálji and Málji, to remove certain woodwork erected by them, within four days from the receipt of the order, or to show cause why the order should not be enforced, it appearing to the Magistrate that the plaintiffs' woodwork was an unlawful obstruction to a public thoroughfare. The plaintiffs took no notice of this order, and the Magistrate caused the woodwork to be removed.

On the 2nd of September 1868, the plaintiffs brought this suit to recover from both the defendants, Jowbá and the Magistrate, possession of a piece of ground, and from the latter alone Rs. 20 as damages caused to them by his removal of the woodwork alluded to above, which had been erected by them upon a part of this ground.

The defendant Jowbá answered that the ground claimed had been purchased by him from the Collector and Magistrate at a public auction held by him in 1868.

The Collector and Magistrate stated that the land, being waste, had been sold by him to the defendant Jowbá by auction, at which the plaintiffs, though present, raised no objection; and that the woodwork had been removed because it was an obstruction to a public thoroughfare.

The District Judge rejected the claim, as he considered it not proved on the evidence.

The appeal was heard by MELVILL and KEMBALL, JJ.

Dhirajlál Mathurádás, for the respondents, contended that the suit would not lie—(I.) Because it would, if successful, in effect reverse the Magistrate's order under Sec. 308 of the Code of Criminal Procedure, contrary to the provisions of Sec. 311 and the provisions of Sec. 1 of the Code of Civil Procedure : *Ujalamayi Dasi v. Chandra Kumar Neogi* (a).

Shántáram Náráyan, for the appellants, contended that there was nothing in the sections quoted to prevent the

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UKHEDA'
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(a) 4 Beng. Law Rep., F. B. R. 24.

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UKHEDA'
et al.
v.
JOWBA'
DOWBA' &
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plaintiff from suing in a civil court to establish his right to the land in question : *Ram Shodoy Ghose v. Juttadharee Holdar* (b). He also cited *Reg. v. Dalsukráam Haribhái* (c).

MELVILL, J.:—A preliminary objection was taken by the respondents in this case, that the cognisance of the suit is barred by Sec. 311 of the Code of Criminal Procedure. We do not think that the provisions of the last para. of that section have any further effect than to bar a suit to prevent a Magistrate from carrying out an order made under Sec. 308, or a suit for damages on account of anything done by the Magistrate or any other person in carrying out such order in the manner provided by law : *Reg. App. No. 11 of 1865*, decided 8th October 1866, 4 *Beng. Law Rep.*, F. B. R. 24. We do not think that it prevents a person, against whom such an order has been carried into effect, from instituting a suit to prove that land declared by the Magistrate to be a public thoroughfare is his private property.

The Court then proceeded to review the evidence, and reversed the decree of the court below, with costs on the second defendant, the Collector and Magistrate of Khándesh.

Decree accordingly.

July 18.

Special Appeal No. 128 of 1871.

KA'KA'JI' SAKHA'RA'M *Appellant.*
GOVIND GANESH et al. *Respondents.*

*Jurisdiction—Special Appeal—Mesne Profits, Suit for—
Small Cause Court.*

A suit for the recovery of mesne profits (not amounting to Rs. 500) is cognisable by a Court of Small Causes.

A special appeal does not lie in such a suit.

THIS was a special appeal from the decision of E. Cordeaux, Acting Assistant Judge of the Konkan, confirming the decree of the Subordinate Judge of Sinnar.

(b) 7 *Calc. W. Rep.*, Civ. R. 95. (c) 2 *Bom. H. C. Rep.* 384 (2nd ed.).

The suit was brought to recover Rs. 260, the amount of the mesne profits of a piece of land decreed to the plaintiff.

Both the lower courts awarded the claim.

The special appeal was heard by MELVILL and KEMBALL, JJ.

Vishnu Ghanashâm for the appellant.

Ghanashâm Nilkant for the respondent.

PER CURIAM:—A suit for the recovery of mesne profits not amounting to Rs. 500 is one cognisable by a Court of Small Causes, and this special appeal is, therefore, dismissed, with costs on the appellant.

Appeal dismissed.

P. B. Boman 158. —
725 Boman 247.

Miscellaneous Special Appeal No. 11 of 1871.

July 18.

GOPA'L GOVIND *Appellant.*

GANESHDA'S TEJMAL *Respondent.*

Limitation—Execution—Act XIV. of 1859, Sec. 20.

An application for the execution of a decree, though made within three years from the date of a previous application, is barred, under Sec. 20 of Act XIV. of 1859, if the previous application were barred, even though execution was allowed to issue on such application.

THIS was a miscellaneous special appeal against the order of A. Bosanquet, Judge of the District of Ahmednagar, reversing the order of the First Class Subordinate Judge of Ahmednagar.

The applicant in 1860 obtained a decree in his favour. In 1867 he applied for its execution, and execution partially proceeded upon it, although no proceedings had been taken during the three years next preceding the application. In 1870 the applicant made his present application for further execution.

The court of first instance held the application to be barred; but the District Judge was of a different opinion. He said: "If the point at issue now were whether the application of 1867 was time-barred or not, it might be held to be

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TEJMAL.

time-barred ; but that application has been enforced by a competent court, and cannot now be held to have been barred."

The special appeal was heard before MELVILL and KEMBALL, JJ.

Ghanashám Nilkant for the special appellant.

No one appeared for the opposite party.

PER CURIAM :—It appears that execution of the decree was barred in 1867, and the right to execute it cannot be revived by reason of the illegal proceedings which were taken in 1867, either in consequence of the inadvertence of the court, or the absence of opposition on the part of the judgment-debtor. The Court concurs in the view expressed by the Full Bench of the Calcutta Court in *Bisseshur Mullick v. Maharaja Mahatab Chunder Bahadoor* (a).

Judge's order reversed.

(a) 10 Calc. W. Rep., F. B. R. 8.

1871. July 19.

Special Appeal No. 182 of 1871.

July 19.

RA'ZA'BA'I KOM RANGOJI *Appellant.*
SADU bin BHAVA'NI *et al.* *Respondents.*

Maintenance—Hindú Widow.

Where the nearest relative of a Hindú widow sued for recovery of property in her possession, and the lower appellate court awarded the claim without fixing the amount of maintenance to be given to the widow :

The High Court remanded the suit in order that the amount of maintenance might be fixed, notwithstanding that the widow claimed maintenance in that court for the first time.

THIS was a special appeal from the decision of M. B. Baker, Acting Senior Assistant Judge of Solápur, in Appeal No. 141 of 1870, reversing the decree of the Subordinate Judge of Pandharpur.

The plaintiffs, as the heirs of the defendant's husband, sued to recover property in her possession, and to obtain damages for loss of crops.

The court of first instance rejected the claim upon the evidence.

The appellate court reversed that decree and awarded the claim, holding the plaintiffs to be entitled under a will (exhibit No. 3).

The special appeal was heard by MELVILL and KEMBALL, JJ.

Bahiravnáth Mangesh, for the special appellant :—Exhibit No. 3 is a deed of gift, and not a will. At all events the claim should not have been awarded before fixing the amount of the widow's maintenance: *Rádhúbái*, widow of *Rango*, v. *Shankráji*, Special Appeal No. 216 of 1868, decided by WARDEN and GIBBS, JJ., on the 3rd of July 1868.

Ganpatráv Bháskar, *contrá*.

PER CURIAM :—The Court thinks that the Senior Assistant Judge was not in error in construing exhibit No. 3 as a will; and on this ground the Court upholds his judgment so far as it awards possession to the plaintiffs. But it has been shown to the court that this court has, in numerous cases, with a view to avoid multiplicity of suits, directed that an award of maintenance to a female defendant in possession should be included in the decree awarding possession to a plaintiff who, as nearest relative, is liable for such maintenance. Following the precedents referred to, the Court remands the case, in order that the court below may determine the amount of maintenance to which the defendant is entitled, and may make a decree accordingly. The defendant must bear the costs up to the present date.

Decree accordingly.

1871.
RA'ZA'BA'I
v.
SADU BHA-
VA'NI
et al.

1871.
July 24.

Special Appeal No. 135 of 1871.

DESA'JI LAKHMA'JI *Appellant.*
BHAVA'NIDA'S NAROTAMDA'S..... *Respondent.*

Pleader's Fees—Special Appeal—Costs.

Unless the order of a lower court in awarding costs be contrary to law, no special appeal will lie against such order.

Amír Sáheb v. Jamsedji (4 Bom. H. C. Rep., A. C. J. 41) followed.

Semle. A regular appeal in respect of costs will not lie where there has been *bonâ fide* care and discretion exercised on the part of the court below.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District of Súrat, in Appeal No. 1 of 1869, confirming the decree of the Subordinate Judge of Súrat.

The suit was brought to recover damages caused to the plaintiff by breach of a contract on the part of the defendants to deliver cotton.

One of the defendants, Mithá Rághú, made a separate defence, and engaged a separate Pleader. The defence of the other defendants, including the appellant Desáji, was substantially the same, but Desáji employed a separate Pleader.

The court of first instance allowed a part of the claim. It awarded the costs in proportion on the plaintiff and one of the defendants; and the costs of the other defendants were thrown on the plaintiff.

The District Judge upheld this decree, but with regard to the assessment of costs said: "As to costs it is urged by the appellant that only one fee should be allowed to counsel for all the subordinate defendants, as their defence was the same, and he quotes the case of *Joykissen Mookerjee v. Hurrybungso Burraul and others* (a). Against this the respondent's *rakíl* quotes *Rajah Rooddur Narain Roy v. Coomar Narain Patnail and others* (b). This last, however, appears to be a decision having reference to special rules of the Calcutta High Court, and not generally applicable.

(a) Marshall 95, from the Indian Digest, Head "Costs," p 176.

(b) 13 Calc. W. Rep., Civ. R. 320.



"I consider that one fee might fairly be allowed for all the subordinate defendants except Nichhá Rághú, who made a statement distinct from the general defence, and another fee on his account."

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The special appeal was heard by MELVILL and KEMBALL, JJ.

Chunilál Mániklál, for the appellant :—This special appeal has reference to costs only. Under Reg. II., of 1827, Sec. LII., cl. 1, "Each Pleader employed in prosecuting or defending an original suit shall be entitled to a percentage," &c. If the word "party" in this section meant "plaintiff or plaintiffs" on the one side, and "defendant or defendants" on the other, then one of several individuals on the one side or the other could not, under cl. 3, Sec. LII., withdraw the authority vested in a Pleader who might have behaved badly to him, or in whom he might not have confidence. This would be inequitable. Then the case set up by one individual may not be the same as his co-defendants', and he should not be compelled to disclose it to the Pleader engaged by them: *Ramchunder Gossain v. Mutty Lal Bagchee* (c).

Nánabhái Haridás, for the respondent :—By Reg. II. of 1827, Sec. LIII., cl. 2, "Either party may engage two or more Pleaders to conduct his suit or defence, but the party found liable in costs will not be answerable for more than the established fee of one Pleader on behalf of the other party." The award of more than one Pleader's fee is illegal. Till Act I. of 1846 came into operation, this fee was recovered as costs in the suit, and no separate suit was necessary. In the matter of costs Sec. 187 of the Code of Civil Procedure gives to the court the largest possible discretion; and when such a discretion is *bonâ fide* exercised no appeal lies: *Atterborough v. Kemp* (d); *Amir Sáheb v. Jamsedji* (e); *Joykissen Mookerjee v. Hurrybungso Burraul* (f).

PER CURIAM :—If this were a regular appeal, we should be inclined to hold, on the authority of *Atterborough v. Kemp*,

(c) 11 Calc. W. Rep., Civ. R. 19.

(d) 7 Jur. 665. (e) 4 Bom. H. C. Rep., A.C. J. 41.

(f) Marshall's Rep. 95.

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that the appeal could not be allowed: for it is evident that there has been a *boná fide* exercise of discretion by the court below. But, the appeal being a special appeal, we have no doubt that we ought to follow the decision in *Amir Sáheb v. Jamsedji (ubi supra)*, in which it was held that a special appeal is not admissible on a matter of costs, unless the order of the lower court be contrary to the law laid down in some Act or Regulation. Now although it may be argued, and has been argued by Mr. Nánábhái, that the court below was not justified in law in awarding so many as two Pleaders' fees against the plaintiff (a point which it is not necessary for us to decide), it has certainly not been shown to us that there is any law which made it obligatory on that court, contrary to its own discretion, to award a third Pleader's fee.

Decree confirmed.

July 27.

Special Appeal No. 76 of 1871.

RUPA'BA'I, widow of Hormasji Nowrozji ... *Appellant.*
 PARBHURA'M KIRPA'SHANKAR *Respondent.*

Fraud—Money paid under a Mistake induced by Fraud—Apportionment—Consideration.

A, a *gumdstá* of B's deceased husband, represented to B that he had her husband's will in his possession, containing a legacy in A's favour, and obtained from B an agreement for Rs. 2,000, expressed to be in consideration of the alleged will being given up to B, of A foregoing his legacy, and of services to be rendered by A in winding up the affairs of the shop. In pursuance of this agreement B paid a sum of money to A; but, upon discovering that the alleged will was not a will at all, sued to recover back the money so paid by her.

Held that, under the circumstances, the taking of the agreement was a fraud upon B; that the payment of the sum of money by B was not a voluntary payment, and could be recovered back; and that the Court could not apportion the amount (if any) that might be claimable by B for work done under the agreement.

THIS was a special appeal from the decision of F. D. Melvill, Acting Judge of the District of Ahmedábád, in Appeal Suit No. 110 of 1868, confirming the decree of M. H. Scott, Assistant Judge at that station.

The facts of the case were these:—

The defendant was the *gumástá*, a salaried servant in charge of business and accounts, of one Hormasji; and the plaintiff was Hormasji's widow. After Hormasji's death the plaintiff executed in favour of the defendant an agreement to the following effect :—

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“ You say that my husband has left his will in your keeping, and that in that will a sum of money is bequeathed to you. I or my heir will pay you Rs. 2,000, in lieu of the legacy mentioned in the will, and upon your fulfilling the following conditions, namely: (1) on your handing over to me the original will; (2) on my receiving in cash the debts due by certain persons, namely, [here follow the names], or, if ready money cannot be obtained, on your taking fresh bonds from the debtors to my satisfaction; (3) on your recovering and paying to me in full all debts due by others besides those above named. Independently of the above sum, your pay will be continued to you as long as you remain in my service.”

The date of this agreement was the 14th of March 1864. On the 1st of February 1865, the plaintiff paid to the defendant Rs. 1,100, and the following indorsement was made upon the agreement:—“ Paid to Parbhurám, on 1st February 1865, Rs. 1,100 on account of this contract.” Subsequently the defendant sued the plaintiff for the balance of Rs. 900; but his claim was disallowed, on the ground that he had failed to perform his part of the contract, and that the so-called will was no will at all. The plaintiff then brought the present suit to recover the Rs. 1,100 paid by her, alleging failure of consideration, and imputing generally to the defendant fraud and misrepresentation.

Upon these facts the Acting Assistant Judge, Mr. M. H. Scott, held that the plaintiff could not recover; and in appeal Mr. F. D. Melvill came to the same conclusion, for the following reasons :—

“ The *onus probandi* is clearly on the plaintiff to show that the payment was not voluntary, but was induced by compulsion or fraud. There was clearly no compulsion in the matter. I will take for granted that what the plaintiff says is true, namely, that the defendant did send to her to ask her to advance him part of the money, which would become due to him on the complete fulfilment of his contract, and that he did then intimate his intention of carrying out the contract. Now in order to show fraud it must be shown

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that he had then no intention of carrying out the contract any further. There is no proof even that he did nothing after that payment. Considerable stress was apparently laid in the former case on the fact that the so-called will was no will. The court found this to be the case, and I cannot, therefore, enter into the question now. Its genuineness was not proved then, but at the same time it was not proved that it was not genuine, and the document is of such a nature that I cannot presume anything against the defendant because he described it as a will. Under these circumstances, there is absolutely no proof that there was any fraud in the original contract, or that the defendant, at the time when he received payment of the Rs. 1,100, and stated that he intended to carry out the contract, deliberately intended to do nothing more in the matter, and thus deceived the plaintiff. The payment then must be looked upon as voluntary; and the only question which remains is, whether the money is recoverable by law. I hold that it is not. The consideration has only partially failed; the contract has been in part performed, inasmuch as the estate has been partially wound up, and the plaintiff has derived some benefit in consequence."

The special appeal was heard by MELVILL and KEMBALL, JJ.

Shántárám Náráyan, for the special appellant:—The payment of Rs. 1,100 by the plaintiff was not voluntary, as it was made under a mistake of fact. In *Milnes v. Duncan* (a) Bayley, J., says: "If a party pay money *under a mistake of the law*, he cannot recover it back. But if he pay money *under a mistake of the real facts, and no laches are imputable to him* in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money." (See also 2 Smith's L. C. 376, 6th ed.) In the present case the defendant represented to the plaintiff that he had in his possession her husband's will. Relying upon this representation, she passes the agreement sued on. It turns out that the alleged will is no will at all; and there is, therefore, a total failure of consideration.

(a) 6 B. & C. 671.

Between the plaintiff and the defendant there is the fiduciary relation of master and servant. If the defendant had a will left by his master in his possession, he, as a paid servant, was bound, without extra remuneration, to give it up to his widow. Instead of this, he studiously withholds it from her. This is positive fraud on his part: Story's Equity Jurisprudence, Secs. 192 to 204, and Sec. 384. With regard to the observation of the learned Judge below, that the consideration has only partially failed, and that the contract has been in part performed, inasmuch as the estate has been partially wound up, and the plaintiff has derived some benefit in consequence, I submit that a Court of Equity will not enter into the question of apportionment: Story Eq. Jur., Sec. 470 *et seq.*

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Nanabhai Haridás, contra:—The court has only to consider whether there was not a paper, be it valid or otherwise, on the consideration of the giving up of which, among other things, the plaintiff passed to the defendant the agreement now sued upon. There is a conclusive finding of the court below that there was such a paper; and both parties fully knew that that was the case. Even though the defendant may not be entitled to recover on the agreement, the plaintiff cannot ask back what she has paid for services already rendered.

MELVILL, J.:—We are of opinion that, under all the circumstances, the plaintiff is entitled to recover. The so-called will is not a will at all, and the defendant must have known that it was not. Even if it be genuine (which has never been proved), it is incomplete: it bears neither date nor signature, and is attested by no witness. At the best it is nothing more than the draft of an intended will. The defendant, as a man of business, must have known that it was invalid, and that no legacy could be recovered under it. With this knowledge, he studiously kept the paper out of sight of the plaintiff, and persuaded her that he had in his possession a genuine will, under which he was entitled to a legacy. Under the influence of this misrepresentation, she agreed to pay him a sum of Rs. 2,000, for which in fact she received no consideration whatever. There was no will,

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and if there had been, the defendant was bound to give it up to the plaintiff, as next of kin. Similarly, being retained in the plaintiff's service as a salaried *gumástá*, he was bound to recover the debts due to the shop without any extra payment beyond his salary. Considering the fiduciary relation which subsisted between the parties, the disadvantage under which the plaintiff laboured by reason of her sex and ignorance of business, the power which the defendant's position gave him, the misrepresentation by which the plaintiff was induced to sign the agreement, and the absence of all consideration for the agreement, we have no hesitation in saying that the plaintiff's promise was obtained by fraud, and that she was not bound to pay any portion of the sum of Rs. 2,000.

But it has been argued that although the contract was one which could not be enforced, yet the payment of Rs. 1,100 was made by the plaintiff voluntarily and with her eyes open, and that, therefore, the money cannot be recovered. It is on this ground that the courts below have disallowed the claim. But we hold it to be clear law that a person is entitled to recover money obtained by fraud, and even money paid in ignorance of the facts—at least when there has been no laches in the party paying it. The cases bearing upon this point will be found collected in the note to *Marriot v. Hampton* (b). In the present case the payment was made in performance of a promise which had been obtained by fraud. It was made under a mistaken belief that the plaintiff was bound to perform an agreement, which she was not bound to perform. This was not a mistake of law, but of fact: for the reason why she was not bound to perform the agreement was that it had been obtained by fraud; and at the time of the payment she was not aware of the facts constituting the fraud. The so-called will had not been given up, and she had not been permitted to see it. It is said that the defendant is entitled to retain the Rs. 1,100, in consideration of services actually rendered in winding up the estate. But these services he was bound to perform in return for his regular

(b) 2 Sm. L. C. 375.

salary; and even were it otherwise, we cannot apportion the payment, or any part of it, and say that it was made in return for service, and not in consideration of the defendant giving up the will or foregoing his pretended legacy. If anything be due to the defendant for work and labour done, he may be entitled to sue for it, but he cannot retain on this account money which he has obtained partly, if not wholly, by fraud.

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Decree reversed.

Regular Appeal No. 40 of 1870.

August 9.

RANGOBA' NA'IK bin RA'GHOBA' *Appellant.*
THE COLLECTOR OF RATNA'GIRI' *Respondent.*

Deshmukh, "usual services" of—Act XI. of 1843, Sec. 2—Limitation—
Act XIV. of 1859, cl. 12 & 16.

By Sec. 2 of Act XI. of 1843 hereditary officers are bound to "render the usual services of their respective offices, as far as the same may be required by the Collector or other officer under whose control they may be placed by usage or the orders of Government."

Semble, that the "usual services" of a Deshmukh consist in making himself thoroughly acquainted with all circumstances affecting the land revenue in his district, and in communicating such information to the Mámlatdár or Mahálkari; and that the Deshmukh is bound to perform or get performed so much writing business as is necessary for the above purposes, and no more. But if by reason of the subdivision of his táluká his duties in that respect are increased, he is bound either personally to perform such increased duties, or to provide a Kárkun or Kárkuns to perform them for him.

Where a Collector in the year 1854 employed certain Kárkuns to assist a Deshmukh in the performance of his duty, deducting the amount of their pay from the *deshmukhi watan*, but failed to show that the employment of such Kárkuns was necessary, *it was held* that the Deshmukh was entitled to recover the amount so deducted from his *watan*; that his cause of action was not barred in 1870, for that a new cause of action in respect of such deductions accrued each year in which the deduction was made, and that six years' arrears of such deductions could be recovered under Sec. 1., cl. 16 of Act XIV. of 1859.

THIS was a regular appeal from the decision of A. Lyon, Acting District Judge at Ratnágirí, in Original Suit No. 77 of 1869.

The appeal was argued before MELVILL and KEMBALL, JJ.

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 Pleader) for the respondent.

The facts of the case sufficiently appear from the judgment of the court, delivered by—

MELVILL, J. :—This case presents a fair specimen of the manner in which the defence of suits against Government in the Mofussil is ordinarily conducted.

The mode of defence is almost invariably as follows:—A suit being brought against a Collector on account of some revenue exaction, or some payment withheld, the Collector puts in a written statement in which he commences by pleading the Statute of Limitations, whether or not there is the smallest ground for such a plea. He then proceeds to say that the suit is barred by Act XVIII. of 1850, which is an Act for the greater protection of Magistrates and others acting judicially. Then follows a justification of the act complained of, by a reference to certain sections of Regulations and Acts which, as often as not, have nothing to do with the matter in question. After the settlement of issues, the Collector obtains as many adjournments as the court is disposed to grant, and finally, having put in little or no evidence, he leaves the court to arrive at the best decision it can, with the aid of such books of reference as the Judge can lay his hands on, and such knowledge of the details of revenue administration as he may have acquired in the course of his own service as a revenue officer.

In the present case we have the usual plea of limitation, for which there is rather better ground than there ordinarily is; the plea of protection by Act XVIII. of 1850, which is simply absurd, and has of course been abandoned; a justification of the act complained of, by a reference to Sec. 4 of Act XI. of 1843, which is so utterly inapplicable that the learned Legal Remembrancer supposes it to have been quoted by mistake; and the usual omission to put in any evidence

which could in any way assist the court in arriving at a decision.

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The suit is brought by a *Sar Desái* or *Sar Deshmukh* (the terms are interchangeable) to recover from the Collector of Ratnágirí certain sums deducted from the proceeds of the *watan* during the years 1857-58 to 1868-69, and expended by the Collector in payment of two Kárkuns, who were employed without the plaintiff's consent. The plaint states that three Kárkuns were so employed, but it appears from the statement of the plaintiff and one of his witnesses that he, or a member of his family, has all along acted as one of these Kárkuns, and received the salary: so that we have really only to deal with the money of which the plaintiff has been deprived by the employment of two Kárkuns. Two minor demands are stated in the plaint, but it is admitted that we are not called upon to decide on the merits of these claims, as no evidence has been offered that the plaintiff has sustained any loss in respect of them.

The material part of the defence is that the suit is barred by limitation, inasmuch as the two Kárkuns were first employed in 1854; and that the Collector had a right to entertain these Kárkuns to perform duties which the plaintiff either could not or would not perform.

As regards the question of limitation, I am of opinion that the case of *Ráiji Manohar v. Desái Kulliánrái Hukmatrái (a)*, on which the District Judge relies, is not in point, and that the claim is not barred, so far at least as it relates to arrears accruing due during the six years preceding the institution of the suit. It is not, and never has been, disputed that the money which the Collector has diverted from the plaintiff's use forms part of the proceeds of the plaintiff's *watan*. The Collector in his written statement says that the Kárkuns were employed in 1854 because an extra establishment was required to assist in the introduction of the Revenue Survey; and exhibit No. 21 shows that this was the reason given at the time for entertaining the Kárkuns. It may

(a) 6 Bom. H. C. Rep., A.C.J. 56.

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 RATNA'GIRI'. be that, as the Collector says, the introduction of the Survey rendered it "urgently necessary" to appoint these Kárkuns in 1854, and he may have had a right to do so; but it does not follow that he had a right to retain their services after the Survey was completed. The plaintiff may have acquiesced while the necessity existed, but it does not follow that he is bound to do so if the necessity has ceased. He may have had no cause of action in 1854, or for some years after, but he may have a cause of action now. I think that the deduction made each year from the plaintiff's allowances must be considered as constituting a new cause of action, and, therefore, that the plaintiff is entitled to recover any such deductions made, without justification, within the period of limitation applicable to the case. Looking to the nature of the claim, I am inclined to think that it is rather a claim for money had and received for the use of the plaintiff, than for the recovery of an interest in immoveable property, and that, therefore, it falls within the provisions of cl. 16, and not cl. 12, of Sec. 1. of Act XIV. of 1859.

I proceed now to consider the merits of the case. The case put before us is that the villages of which the plaintiff is Deshmukh were originally included in one *táluká*, but that at some time before 1854 that *táluká* was divided into three. The duties of the plaintiff's office, it is said, require that he, or some person to represent him, should attend at every *Mámlatdár's* or *Maháلكari's kacheri*; and so long as there was only one *Mámlatdár*, the plaintiff, or a *Kárkun* on his behalf, performed this duty. When, in consequence of the division of the *táluká*, there were three *kacheris* instead of one, the plaintiff was told that he must appoint three *Kárkuns* instead of one, and on his refusal to do so the Collector made the appointment himself.

Now, if this statement of the case be strictly accurate, I think the Collector was justified in what he did. By Sec. 2 of Act XI. of 1843, hereditary officers are bound "to render the usual services of their respective offices, as far as the same may be required by the Collector or other officer under whose control they may be placed by usage or the orders of Govern-

ment." If the usual service of a Deshmukh is to be constantly in attendance, and perform the business of writing, in the Mámlatdár's or Mahálkari's *kacheri*, then, when circumstances made it impossible for the plaintiff to perform the whole duty himself, he was bound to appoint a Kárkun to perform it in each *kacheri* in which it had to be performed. The plaintiff has no right to complain that his duties have been increased by the subdivision of the *táluká*. When the *watan* was granted to his family in consideration of the performance of duties of a particular kind, there was no undertaking that the quantity of service of that kind which he would be called upon to render should be invariable. Moreover, it may be presumed that the *táluká* was divided because it was too large to be efficiently supervised by a single officer: in which case the measure would tend to better administration, and to a consequent increase of revenue, of which the plaintiff, who is paid by a percentage on the revenue, would have the benefit. If he would not himself engage the establishment necessary to assist him in his duties, he cannot complain that the Collector assumed the responsibility of doing so. It is true that there is nothing in Act XI. of 1843 which directly authorises the Collector to do this; but the Act does authorise the Collector to fine an hereditary officer who does not perform his duty, and out of such fine he may pay persons to perform it; so that, to all intents and purposes, the law gives to the Collector the power to entertain such establishment as is necessary for the performance of the usual duties of a *watan*, if the *watandár* refuses to do so himself.

But the question still remains, what are the usual services of a Deshmukh? and was the employment of two extra Kárkuns, or one of them, necessary to enable the plaintiff to perform those services? On these points the Collector has offered no evidence and given no information, and yet it is upon these points that the whole case turns. It is not to be tolerated that Collectors should regard the *watans* of hereditary officers as a fund out of which they may employ as many Kárkuns as they please, and thus make the *watandárs* bear

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the cost of supplementing deficient establishments in Government offices. If the Collector take upon himself to spend any of the proceeds of a *watan*, he is bound to show that the money was spent in securing the performance of duties which the *watandár* was bound to perform.

LR 4 Cal 119.
LR 2 Bom 124.
I hardly find myself in a position to say what the duties of a Deshmukh are. Under the Maráthá government the Deshmukh and Deshpánde held respectively the same position in a parganá which the Pátíl and Kulkarni occupied in a village. The Deshmukh was the chief police and revenue authority, and was responsible for the collection of the revenue. He occupied a position somewhat similar to that of our Mámlatdárs, and since the appointment of Mámlatdárs there would appear to be little occasion for the performance by the Deshmukh of any of his ancient functions. What functions have been substituted for them does not clearly appear. The duties of a Deshpánde have been defined with the most minute detail (Rev. Circular Orders, p. 268); but those of a Deshmukh do not appear ever to have been defined. The plaintiff has put in two exhibits, which have some bearing on the question. Exhibit No. 13 is an order by the Collector of Ratnágiri in 1841 to the effect that Deshmukhs were not to be required to appoint Kárkuns, because writing was not their business. Their duty, the Collector said, was to give information respecting the revenue, or other matters connected with the land, and to accompany the Mámlatdár when required to go out upon any investigation. Such, it was added, was the result of inquiries which had been made as to the custom. Exhibit No. 14 is a circular issued under the order of the Revenue Commissioner in 1847. It forbids the appointment of outsiders when there is any sharer in the *watan* who is competent, and it declares that Deshmukhs are not to be held incompetent because they cannot write, inasmuch as writing is not their business. I find in the Revenue Circular Orders (p. 275) a Government letter, No. 5318, dated 8th September 1848, which is to much the same effect; but this letter indicates that some reading and writing business was considered to devolve upon the Deshmukh, and

it is said that there is no objection to a Deshmukh or Deshpánde employing Kárkuns if he require them. It appears from the plaintiff's own evidence in this case that previously to the division of the táluká he or some member of his family, or a Kárkun on his behalf, did perform some writing business in the Mámlatdár's *kacheri*; and since the division the plaintiff, or his relative, has performed the same duties at one of the Mahál *kacheris*. Mr. Wilson, in his Glossary of Indian terms, says : " Under the present administration the Deshmukh is a district revenue officer who is expected to superintend the cultivation, and report on the state of the crops, to assist in the settlement of the annual revenue, and to give general aid to the Collector and his establishment in the discharge of revenue duties." In a Government letter published at page 271 of the Revenue Circular Orders it is said in regard to Deshmukhs and Deshpándes : " The institution of such *watans* must have had in view to provide a body of public servants, of a permanent character, who, from their constant residence and employment in their villages or districts, would acquire and perpetuate a knowledge of the minutest details." And again at page 275 : " The very object of these officers is that they should be the depositories of all local information respecting their districts." These last extracts agree with what the plaintiff says in his examination-in-chief by the defendant : " It is the duty of the Sar Desái to give information." From these scanty materials we may perhaps safely arrive at the conclusion that the " usual services" of a Deshmukh consist in making himself thoroughly acquainted with all circumstances affecting the land revenue in his district, and in communicating such information to the Mámlatdár or Mahálkari; and that he is bound to perform or get performed so much writing business as is necessary for the above purpose, and no more. It certainly does not follow as a necessary consequence from this statement of his duties that he is bound to employ a Kárkun in every *kacheri* in his district. There would appear to be no physical impossibility in the plaintiff's performing all the duties personally or with the assistance of the single Kárkun whom he formerly employed. At any rate, as I have before remarked, it was

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 RATNA'GIRI' for the Collector to show that the two extra Kárkuns, or one of them, were necessary to ensure the performance of the Deshmukh's usual services; and this he has not even attempted to show.

I would allow the claim to the extent of Rs. 216 per annum (the pay of two Kárkuns at Rs. 9 per mensem) for the six years preceding the institution of the suit. I would also allow interest at nine per cent., and costs in proportion.

KEMBALL, J.:—I concur.

Decree accordingly.

August 10.

Regular Appeal No. 45 of 1870.

RU'PCHAND HINDU'MAL.....*Appellant.*

RAKHMA'BA'I*Respondent.*

Hindú Law—Adoption by Widow—Consent of Kinsmen of Husband—Consent of person in whom Husband's Estate is vested.

Although, as a general rule, the adoption by a Hindú widow of a son to her deceased husband is in the Maráthá Country good, without the consent of her husband's kinsmen, when the estate of her husband is vested in her or in her and her co-widow jointly, yet when such adoption has the effect of divesting an estate already vested in a third person, (*e. g.*) the widow of her husband's deceased brother, the consent of such third person would appear to be necessary to give validity to such an adoption.

Rakhmábái v. Rádhábái (a) and The Collector of Madura v. Muttu Ramalinga Sadhupathy (b) commented on and compared.

THIS was an appeal from the decision of Madan Shríkrishnáji, First Class Subordinate Judge of Puná, in Original Suit No. 39 of 1869.

The plaintiff, Rúpchand Hindúmal, obtained a decree against one Badridás Anandrám, and attached certain immoveable property and 500 Rs. in cash in execution of that decree. The attachment, however, was raised on the application of the defendant, Rakhmábái, under Sec. 246 of the Civil Procedure Code. The plaintiff thereupon brought this suit to establish the right of his judgment-debtor (Badridás)

(a) 5 Bom. H. C. Rep., A. C. J. 181.

(b) 12 Moo. Ind. App. 397; S. C. 10 Calc. W. Rep., P. C. 17.

to the property. He alleged in the plaint that the property in question had belonged to two brothers, Anandrám and Sobhárám, who were undivided in interest, and that Badridás was adopted by Sarjábái, the widow of Anandrám, and that Badridás, therefore, was the owner of the property.

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Rakhmábái answered that she, and not Badridás, had had the possession and management of the property; that on the death of Anandrám the property vested in her husband, Sobhárám, and as widow of Sobhárám she was the sole heir to his property after his death.

It appeared that Anandrám and Sobhárám were two undivided brothers; that Anandrám predeceased Sobhárám, leaving a widow, Sarjábái; that Sobhárám subsequently died leaving a widow, the defendant, Rakhmábái; and that, after the death of Sobhárám, Sarjábái adopted Badridás as the son of Anandrám.

The Subordinate Judge held that the property in dispute belonged to the estate of the deceased Sobhárám; that Rakhmábái, and not Badridás, was the heir of Sobhárám; and, therefore, that the property could not be sold in satisfaction of a decree obtained against Badridás. From this decision the plaintiff appealed to the High Court, and the appeal was argued before MELVILL and KEMBALL, JJ.

Nánábhái Haridás, for the appellant:—No partition of the family property having taken place, and the adoption of Badridás being admitted, the Subordinate Judge was wrong in law in holding that Badridás was not the heir of Sobhárám, and, therefore, owner of the property in dispute. The decree No. 393 of 1865 ought not to be regarded as a decree against Badridás individually, but one binding on the whole family property. The adoption of Badridás was valid, whether the defendant, Rakhmábái, gave her assent to it or not: *Rakhmábái v. Rádhábái* (c).

Dhirajlál Mathurádás, for the respondent:—The adoption of Badridás is invalid, as the respondent did not consent to

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it. But even supposing she did, the consent was limited to Anandrá'm's share of the property, as the property was divided between her and Anandrá'm's widow, Sarjábái. Under that division, Anandrá'm's share, including the shop at Puná, remained in possession of his widow, Sarjábái, and Badridás. Rakhmábái had exclusive possession of the shop at Sirur, and the rest of Sobhárá'm's property.

MELVILL, J. :—This is a suit to establish the plaintiff's right to attach certain property in execution of a decree against one Badridás.

The decree was sought and obtained against Badridás as heir of Sobhárá'm and Anandrá'm, and as manager of two firms, described as the firms of Nensukh Sobhárá'm and Nensukh Anandrá'm.

The admitted facts of the case are these :—Anandrá'm and Sobhárá'm were brothers undivided in interest. Anandrá'm predeceased Sobhárá'm, and both died without issue. Anandrá'm left a widow, Sarjábái, who adopted Badridás after the deaths of Anandrá'm and Sobhárá'm. Sobhárá'm left a widow, Rakhmábái, the defendant in the present case. Anandrá'm and Sobhárá'm had shops at Puná, Sirur, and other places, and after their death these shops continued to be carried on, that at Puná under the name of Nensukh Anandrá'm, and that at Sirur under the title of Nensukh Sobhárá'm. The debt for the payment of which the plaintiff's decree was obtained was incurred by Badridás on account of the Puná shop, but the property which has been attached belongs to the shop at Sirur.

In 1868 the plaintiff attached certain property in execution of this same decree. The attachment was raised on the application of Rakhmábái, and the plaintiff brought no suit to establish his right. It has been contended for the defendant that the present suit is barred by the order passed in the former inquiry, under Sec. 246 of Act VIII. of 1859. But as the order for raising the attachment was passed solely on the ground that the property then attached was not proved to be in the possession of the plaintiff's judgment-debtor,

Badridás, it does not affect the question of the plaintiff's right to attach the other property.

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The questions for determination are: (1) whether Badridás, as the adopted son of Anandráam, is owner of the attached property; and (2) if not, whether the property is liable to be attached and sold under a decree obtained against Badridás as manager of the firms of Nensukh Sobhárám and Nensukh Anandráam.

On the death of Anandráam the whole family property vested in his brother, Sobhárám, and on Sobhárám's death his widow, Rakhmábái, succeeded to the whole. The legal effect of a valid adoption by Anandráam's widow would be to divest Rakhmábái of the estate. It has been repeatedly held that adoption by a widow has a retrospective effect, and, relating back to the death of the deceased husband, entitles the adopted son to succeed to his estate as the same stood at the date of his death. A son adopted by a widow is in the same position as a posthumous son, and may even set aside an alienation made by the widow to the prejudice of the property, unless made under circumstances of inevitable necessity. It results from this fiction of Hindú law that if the adoption of Badridás was a legal adoption, Badridás must be considered to have been a coparcener with Sobhárám from the date of Anandráam's death, and to have succeeded to the whole estate on the death of Sobhárám.

The question is, whether an adoption by a widow, which has the effect of divesting an estate already vested in a person other than the widow, is a valid adoption.

I should feel very great difficulty in holding that such an adoption would be valid if made without the consent of the kinsman or kinsmen in whom the property of the deceased had vested. It is true that in *Rakhmábái v. Rádhábái* (d) it was held that in the Maráthá Country an elder Hindú widow has the power to adopt a son to her deceased husband without the consent of a younger widow, notwithstanding that the younger widow has a vested interest in the property.

(d) 5 Bom. H. C. Rep., A. C. J. 181.

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But the case of two widows is a peculiar one. In his judgment in that case, Couch, C. J., said: "It would seem to be unjust to allow the elder widow to defeat the interest of the younger by an adoption against her wish. But, on the other hand, if the adoption is regarded as the performance of a religious duty and a meritorious act, to which the assent of the husband is to be implied wherever he has not forbidden it, it would seem that the younger widow is bound to give her consent, being entitled to a due provision for her maintenance; and if she refuses, the elder widow may adopt without it." In this I entirely concur. The two widows being equally bound to take the measures necessary to secure their husband's future beatitude, the younger widow, who, by withholding her consent, ignores the religious obligation imposed upon her, has no right to complain of injustice if the adoption be made by the elder widow without her consent. But it does not follow that the plea of injustice is to be equally disregarded where it is put forward by a person who is under no such religious obligation. In *Rakhmábái v. Rádhábái* it was certainly laid down in the broadest terms that in the Maráthá Country a Hindú widow may without the consent of her husband's kindred adopt a son to him, if the act is done by her in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. But the Judges by whom that case was decided were not dealing with an adoption which would have the effect of divesting an estate vested in a relative other than a widow, nor in any of the decided cases on which they relied was the validity of such an adoption in issue. It does not appear to me that the authorities quoted would be sufficient to support the validity of an adoption working such manifest injustice.

In the case of *The Collector of Madura v. Muttu Ramalinga Sadhupathy* (e), the Judicial Committee of the Privy Council have determined that, according to the law prevalent in the Dravidá Country, a Hindú widow, not having her husband's permission, may, if duly authorised by his kin-

(e) 10 Calc. W. Rep., P. C. 17.

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dred, adopt a son to him. They then go on to say: "The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband is the first to suggest itself. Where the husband's family is in the normal condition of a Hindú family,—i.e., undivided—that question is of comparatively easy solution. In such a case the widow, under the law of all the schools which admit this deputed power of adoption, takes no interest in her husband's share of the joint estate except a right to maintenance. And, though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet if there be no father the consent of all the brothers, who in default of adoption would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will." Their Lordships then proceed to express an opinion that when the family is divided, and the widow has consequently taken by inheritance her husband's separate estate, it is not necessary for her to obtain the consent of reversioners, but it is sufficient for her father-in-law, or some responsible kinsmen whose concurrence in the adoption may be sufficient evidence that the act was done by the widow in the proper and *boná fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In other words, when the estate is vested in the widow, she may adopt without the consent of reversioners, but when the estate is vested in persons other than the widow, and the immediate effect of an adoption would be to defeat the interest of those persons, then justice requires that their consent should be obtained. This proposition seems very reasonable and just; and it is based upon authorities which, though not regarded with so much respect here as in the Dravidá Country, are not without weight in this Presidency. The decision in *Rakhmábái v. Rádhábái*, and the authorities on which it is based, may be accepted without hesitation, as showing that in the Maráthá Country a widow in whom the estate is vested may show by other evidence than the assent of a

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responsible kinsman that (to use the words adopted by the learned Judges from the decision of the Privy Council above referred to) the act of adoption was done by her in the proper and *boná fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. But where the estate is vested in another than the widow, I should be disposed to hold that justice would require us to follow the opinion of the Privy Council as to the necessity of the assent of the person whose interest would be defeated by the adoption. It has not escaped me that in referring to the remark of the Privy Council, Couch, C.J., says: "The interest of the younger of two widows cannot, we think, be regarded in the same light as that of a member of an undivided family, and probably their Lordships would not consider the remark applicable in cases where, by the law which governs them, no consent of kinsmen is required." I, too, think that their Lordships would probably not consider their remark applicable in the particular case of the two widows which the Chief Justice was considering: for, as I have remarked, that was an exceptional case, in which an argument founded on injustice could not be maintained. But in cases in which a deviation from the opinion expressed by the Judicial Committee would work manifest injustice, I am disposed to think that their Lordships would consider their remark applicable.

Although I have thought it necessary to make these observations in order to show that I do not assent to the argument of the appellant's Pleader in this case, who maintains, on the authority of *Rakhmábái v. Rádhábái*, that the adoption of Badridás is valid, whether or not Rakhmábái consented to the adoption, yet it is not necessary for me to do more than express an opinion that the adoption would have been invalid without Rakhmábái's consent, because there is sufficient evidence that Rakhmábái did consent to the adoption.

The evidence of the plaintiff's witnesses Nos. 49 and 50 is to the effect that Sarjábái, Anandram's widow, and Rakhmábái brought Badridás when a boy from Farrakábád; that both ladies proclaimed that he had been adopted as heir

both of Anandrám and Sobhárám ; that they gave caste-feasts in honour of the event, and publicly seated the boy on the *gádi* of the shops both at Puná and Sirur. It is in evidence that, during Badridás's minority, suits in connection with the Sirur shop were brought in the name of Badridás (exhibits Nos. 11, 13, and 18), and this could hardly have been done without Rakhmábái's knowledge and consent. It is shown that, when he came of age, Badridás managed the shop at Sirur as well as that at Puná (witnesses Nos. 50, 52, 53, and 54) ; that he drew *hundis* in the name of Nensukh Sobhárám (exhibits Nos. 15, 16, and 17), which were duly entered in the books at Sirur (exhibit No. 62 and witness No. 54) ; that money was paid from the Sirur shop in liquidation of debts incurred by Badridás at Puná (witness No. 61) ; and that after quarrelling with Rakhmábái, who took possession of the Sirur shop, he continued to conduct the Puná business until it failed. This evidence shows clearly that Rakhmábái consented to the adoption, and intended that the adoption should have its full legal effect, namely, that of making Badridás the heir of the entire estate of Anandrám and Sobhárám. Some of the evidence is objected to, as being that of interested witnesses ; but it would seem to have been easy to disprove it if it had been false, and this the defendant has not attempted to do. It has been suggested to us that Rakhmábái only consented to an adoption so far as it affected Anandrám's share of the property, and that she and Anandrám's widow did, in fact, divide the property, Anandrám's widow and Badridás remaining in possession of Anandrám's share, including the shop at Puná, while Rakhmábái had exclusive possession of the shop at Sirur and the rest of Sobhárám's property. But this is quite a new case, and inconsistent with that set up by Rakhmábái in the court below. It is also inconsistent with the admitted fact that Anandrám and Sobhárám were undivided ; it is not supported by any evidence of any subsequent division between the widows, and it is contradicted by the evidence which has been already reviewed, and which shows that Badridás was put in possession of the shop at Sirur as well as of that at Puná.

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The only circumstance in favour of it is that in 1848, after the death of Anandrám and Sobhárám, their two widows applied for a joint certificate of administration to their estates, and a joint certificate was granted, in which Sarjábái was declared to be the heir of Anandrám, and Rakhmábái to be heir of Sobhárám. This certainly goes to show that Rakhmábái was at that time ignorant of, or indisposed to assert, her strict legal rights : but it also shows that the two widows were acting in complete accord in regard to the management of the whole estate, and so lends confirmation to the evidence that they acted in accord in adopting an heir to the estate.

On the whole, I see no reason to doubt that the adoption was made with the consent of Rakhmábái, and with the intention on her part that it should have its full legal effect. Having been made with such consent and intention, I am of opinion that the adoption is valid, and that the effect of it is to make Badridás the owner of all the estate of Anandrám and Sobhárám, including the property which has been attached by the plaintiff in execution of his decree against Badridás. It follows that the plaintiff is entitled to a decree, and that it is unnecessary to go into the second question of the effect of the plaintiff's previous decree, so far as it purports to be against Badridás, as manager of the firms of Nensukh Sobhárám and Nensukh Anandrám.

The Pleader of the respondent, in support of his argument that an adoption can in no case be held valid which has the effect of divesting an estate once vested, has referred to the case of *Bhoobun Maye Debia v. Ram Kishore Acharjee* (c). In that case A claimed, by virtue of adoption, an estate which B had inherited from C. Even if A had been a natural-born son, B, and not A, would have been the heir of C ; and it was held that under such circumstances A could not defeat B's estate. There would seem to be no room for doubt on this point, and the decision in that case certainly does not support the argument (which is, moreover, at variance with the decision in *Rakhmábái v. Rádhábái*)

(c) Sutherland's Privy Council Judgments, p. 574 ; also in 3 Calc. W. Rep., P. C. C. 15.

that an adoption can in no case operate to defeat an interest once vested.

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I would reverse the decree of the court below, with costs.

KEMBALL, J.:—I concur.

Special Appeal No. 117 of 1870.

Feb. 22.

DAYA'BHA'I DI'PCHAND *Appellant.*

MA'NIKLA'L VRIJBHUKAN *Respondent.*

Shares—Sale for future delivery—Notice by Purchaser that he will not accept—Readiness and Willingness of Vendor to deliver—Pledge of Shares to a third person.

Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day, gives notice to the vendor that he (the purchaser) will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares.

Semble. The mere fact that such shares are pledged to a third person is not sufficient to show that the vendor is not ready and willing to deliver them, if there is nothing to show that the pledgee is not willing to assist the vendor in carrying out his contract, and it being apparently for the advantage of the pledgee that he should do so.

THIS was a special appeal from the decision of the Judge of the District of Súrat, confirming the decision of the Sadr Amín of Broach.

Dayábhái Dípchand instituted this action to recover the sum of Rs. 3,825, being the balance due on account of forty shares of the Broach Bank and Finance Corporation, Limited, alleging that the defendant, Mániklál, had entered into an agreement with him on Phálgun Vad 7th, Samvat 1921 (19th March 1865) to pay for, and take delivery of, the said shares from him on or before the 15th of July following, but that the defendant, Mániklál, had refused to take delivery when the shares had been tendered to him on the day agreed on.

The plaintiff, accordingly, sued to recover the contract value of the shares less the proceeds from the sale of the shares.

The defendant, Mániklál, admitted the execution of the agreement, but said that it was a *sattá*, or wagering contract,

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and was void by law; further that the plaintiff, Dayábhái, had not been ready or able to perform his part of the contract, by delivering the shares as agreed upon; and, consequently, that the action could not be maintained.

The Šadr Amín of Broach rejected the claim of the plaintiff on the grounds that the plaintiff, Dayábhái, had not actually tendered the shares to the defendant, Mániklál, on the fixed day, and that he had not been ready and willing to do so, as the shares allotted to the plaintiff were in the custody of the said corporation on the appointed day, and long afterwards, and as the deed of the corporation prohibited the plaintiff, Dayábhái, from assigning such encumbered shares.

On appeal the District Judge of Súrat laid down two points for consideration:—(I.) Whether the lower court wrongly found that the plaintiff had failed to prove his readiness to perform his part of the contract, such being a condition precedent to his right of action; and (II.) Whether the lower court improperly, and to the plaintiff's material prejudice, rejected any portion of his evidence. On both these points he found for the respondent, Mániklál. "The lower court found upon the facts that the plaintiff was not able and willing to perform his part of the contract, and I quite concur in that finding: for, setting aside other facts from consideration, it is perfectly clear that the plaintiff was not *primâ facie* able and willing, so long as the bank's lien remained undischarged, to make a valid transfer of the shares."

The plaintiff appealed from the decision of the District Judge of Súrat, and the appeal was argued before WESTROPP, C.J., and LLOYD, J.

Macpherson (with him Chunilál Mániklál), for the appellant:—Both the lower courts have decided against the plaintiff, on the ground that he had mortgaged the shares, and was, therefore, not in a position to sell the shares without paying off the mortgagee. The vendor, however, could have, with the vendee's money, paid off the mortgagee and made over

the shares to the vendee. The shares had gone down and become worthless in July, and the mortgagee would, therefore, have been willing to part with the shares on payment of the agreed price by the vendee. It appears that notice was sent by the plaintiff on the 9th of July, six days before the day agreed upon for delivery, of his readiness to deliver the shares. The defendant sent a reply on the 13th of July, in which he urged that the contract was a wagering transaction—that no particular shares were agreed to be sold. By this reply the defendant refused to perform the contract two days before the day agreed upon for the delivery. The fact of the mortgage could not prejudice the plaintiff's claim to recover on the contract, for it appears the mortgagee had delivered the shares to the plaintiff for tender to the defendant.

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Leith (with him *Shántáram Náráyan*), for the respondent:—The evidence on which the appellant relies to show that the mortgagee was willing to join in tendering the shares to the defendant has been disbelieved by the lower court. The mortgagee in this case was the bank itself, and the vendor should have obtained the bank's consent before a legal and valid transfer could be made.

WESTROPP, C.J.:—It being admitted on both sides that the appellant, on the 9th of July 1865, gave notice to the respondent, Mániklál, of his (the appellant's) readiness and willingness to deliver the shares, the subject of the contract, contained in the agreement of the 19th of March 1865, upon the due date for the delivery of the shares, namely, the 15th of July 1865; and that the respondent, on the 13th of July 1865, gave a notice in reply to the appellant, Dayábhái, that he, the respondent, for reasons wholly unconnected with the readiness and willingness of the appellant to deliver such shares, would not accept the shares (on which reasons the respondent did not rely before the District Judge), the issue as to the readiness and willingness of the appellant to deliver the shares on the 15th of July 1865 was immaterial, as the respondent had, by his conduct in giving the said notice in reply of the 13th of July 1865, exonerated the appellant

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from giving proof of such readiness and willingness (a). Even if that issue had been material, the court is of opinion that the District Judge gave a reason insufficient in point of law to uphold his finding that the appellant was not ready and willing to deliver the shares. The mere fact, standing alone, that the shares were pledged to the Broach Bank and Finance Corporation, Limited, was not sufficient proof that the appellant was neither ready nor willing to deliver the shares, as there is nothing to show that the Broach Bank and Finance Corporation, Limited, would not have assented to the delivery of the shares by the appellant to the respondent. In fact, the reasonable probability is that they would have gladly assisted the appellant to the uttermost, as the shares had fallen in market-value far below the contract price of the 19th of March 1865, and the only mode of realizing the latter price was by forcing the respondent to perform that contract. However, the court does not decide this case upon the issue as to readiness and willingness, but on the ground that the making and non-performance of the contract by the respondent are not denied, and that the issue as to readiness and willingness is immaterial, the respondent having, shortly before the arrival of the day for delivery, notified to the defendant (respondent) that he would not accept the shares, and not having, before the District Judge, relied upon or established any of the reasons put forward in that notification for declaring that he would not accept the shares. The same grounds for this court's decision render it unnecessary to say whether any actual tender of the share-certificates was made or was necessary. The court reverses the decisions of the courts below, and makes a decree for the appellant, Dayábhái, for Rs. 2,970 damages, and costs in the courts below, but no costs of this special appeal.

(a) *Ripley v. McClure*, 4 Exch. 345, 359; *Danube and Black Sea Rail. Co. v. Xenos*, 11 C. B., N. S., 152; 13 *Ibid.* 825; S. C. 31 L. J., C. P. 84, 284; *Cort v. Ambergate Rail. Co.*, 17 Q. B. 127; 20 L. J., Q. B. 460; and see *Jones v. Barkley*, 2 Douglas 684 and 8 East 437; 7 M. & W. 474; 1 T. R. 638; 1 C. B. 75; 8 C. B. 751, 762.

*Referred Case.*1871.
June 26.

BA'I KÚ'VAR *Plaintiff.*
 VENIDA'S GÁNGA'RA'M *Defendant.*

Writ of Attachment against Person or Goods—Execution by Sheriff or Názar—Breaking open Outer Door of Dwelling-house—Breaking open Inner Door.

A Názar or Sheriff cannot, under a writ of attachment, break open a defendant's dwelling-house to execute civil process against his person or goods if the outer door is closed and locked, even when he finds that the defendant has absconded to evade such execution.

The privilege extends to a man's dwelling-house or out-house or any office annexed to the dwelling-house, but not to a building standing at a distance from the dwelling-house and not forming parcel of it.

If, however, the outer door of the defendant's dwelling-house be open, and the Sheriff or Názar enter, he may afterwards break an inner door to take the goods.

THE following question was submitted for the opinion of the High Court by Gopálráv Hari Deshmukh, Judge of the Court of Small Causes at Ahmedábád, under Sec. 1 of Act X. of 1867, and came before WESTROPP, C. J., and GIBBS, J. :—

“Can a house be opened by the Názar, holding a writ of attachment of moveable property, when he finds that it is closed, locked up, and there is no one in it, the defendant having apparently absconded leaving his house in that state?

“The plaintiff filed his suit, and immediately afterwards applied for attachment previous to judgment, on the ground that the defendant, having become insolvent, was about to remove his property. A writ was granted, but the Názar, on going to the house in which the defendant resided, found that the defendant had gone away, leaving a lock on it. The Názar has applied for instructions as to how he should proceed in executing the writ under the circumstances.

“It is usual for merchants and traders, when they become insolvent and are unable to satisfy their creditors, to abscond and to conceal themselves for some time till the irritated feelings of their creditors have been cooled down by time. They generally close their houses and shops, and often do not

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leave anybody in them. Attachments previous to judgment are applied for on such occasions, in order to secure what little property might be found in the house. I have doubts as to the manner of proceeding under such circumstances, and, therefore, refer this question.

“The practice in many courts is to open houses by removing locks, and to attach the property in them in the presence of two or more respectable persons in the neighbourhood. If houses are not thus opened, there would be considerable hardship to the parties seeking redress.

“My opinion, however, is that no attachment should be made unless the house is found open.”

WESTBOPP, C.J., :—The Judge of the Court of Small Causes at Ahmedábád has submitted the following question for the opinion of this court. (*See above.*)

We must reluctantly answer this question in the negative, and, therefore, in accordance with the opinion of the learned Judge himself, who seems to have arrived at it with regret. We have anxiously sought authority to the effect that the absconding of the defendant would justify the Názar in breaking open the outer door of the house, but have not, after a most careful search, been able to find any decision or even dictum which would warrant us in asserting that the absconding of the defendant alters the general rule that every man's dwelling-house is his castle, and that if the outer door be locked, the Sheriff or Názar may not break it open for the purpose of executing civil process against his person or goods. The authorities will be found collected in the note to *Semayne's Case*, 1 Smith's L. C. 39, 44, *et seq.* (3rd ed.), and in the notes to the report of the same case, 5 Coke's Reports by Frazer, p. 188 (91 *a*), and Addison on Torts, p. 629 (3rd ed.); 2 Bac. Abr., Execution, N.; 4 Comyn's Dig. (by Hammond), Execution, C. 5. The privilege has been applied even to an unfinished house: *Whalley v. Williamson* (*a*). It extends to a man's dwelling-house or out-house or other office annexed to the dwelling-house, but not to a

(*a*) 7 Car. & P. 294.

building, such as a storehouse or barn, standing at a distance from the dwelling-house and not forming parcel of it : *Penton v. Browne* (b).

If the outer-door of the defendant's dwelling-house be open and the Sheriff or Názar enter, he may afterwards break an inner door, or boxes, trunks, chests, &c., &c., to take the goods (c).

We think that it would be an improvement in the law if, where a defendant, leaving his dwelling-house unoccupied by any member of his family, and with his property locked up in it, absconds for the purpose of evading execution of a decree against him, the Sheriff or Názar were permitted to break open the outer door and to seize the property. On the authorities, we are unable to say that he can now do so; and we think that legislation would be necessary in order to render such a proceeding legal.

GIBBS, J., concurred.

Referred Case.

TUKA'RA'M bin RA'MKRISHNA' *Plaintiff.*

GUNA'JI bin MHA'LOJI *Defendant.*

Hindú Law—Execution against Husband—Ornaments of Wife—Strídhan when liable to seizure ; when not.

Ornaments on the person of a Hindú wife, if forming part of her *strídhan*, cannot be taken under an execution against her husband. On certain occasions, however, the husband may take them, but the right is personal to him.

JANA'RDAN VA'SUDEVJI, Judge of the Court of Small Causes at Puná, submitted for the decision of the High Court the question—"Can the ornaments on the person of the wife of a judgment-debtor who is a Hindú be taken in execution sued out against the husband ?

"The question has arisen in the matter of an application made by the plaintiff (Tukárám) for execution of the decree which he has obtained against the defendant Gunáji.

(b) 1 Siderfin 186 ; S. C. 1 Keble, 698.

(c) 2 R. Palmer 54 ; 1 Brownlow 50 ; 2 Rol. Rep. 2 ; Shower 87 Butt's ed. 403 ; Cowper 1 ; 4 Taunton 619 ; see also 1 Marshall 565 ; 6 Taunton 246 ; Hobart 263 ; 3 B. & P. 229.

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"I am of opinion that the ornaments on the person of a Hindú wife must be taken to be her *strídhan*, which is not liable to attachment for the debt of the husband. Execution, therefore, cannot be levied of such ornaments in the case referred to."

WESTBOPP, C.J., :—The Judge has not stated whence or how the wife obtained the ornaments. The answer to his question, therefore, can only be given hypothetically.

It is perfectly clear that if she obtained the ornaments under such circumstances as to render them part of her *strídhan*, they cannot be taken under an execution against her husband. It is apparently true that in certain exigencies the husband may take them. Sir Thomas Strange, Vol. I., p. 27, says: "The alleged occasions are—the preservation of the family during a famine, which may be construed to mean, generally, want; any distress, having the effect of preventing the performance of an indispensable, particularly of a religious, duty; sickness; imprisonment, and even the distress of a son. *It would seem, however, that the right is personal in the husband, since it has been held in the case of a writ of execution for a debt due by one that the wife's strídhan could not be seized under it; though, had he been arrested or taken, he might (ex concessis) have applied the ornaments on her neck to its discharge, having no other means of extricating himself from legal custody.*" See also 2 Strange, H. L. 23 (*Hammuckah v. Rungapa*); and see Grady, H. L., p. 174.

In order to ascertain what is *strídhan* in this Presidency, careful reference should be made to Ch. II., Sec. XI., of the Mitákshará on Inheritance, and to the Mayúkha, Ch. IV., Sec. X., and West and Bühler, pp. 67 *et seq.* and 109, Part II.

Here, according to the first of those authorities, that is *strídhan* which (whether ornaments or other property) was given to her by her father, mother, husband, or brother; and also that which was presented to her on her marriage by her maternal or paternal uncles or aunts; and also a gratuity given to her on the occasion of a second marriage by her husband, and also what she may have acquired by inher-

itance, purchase, partition, seizure, or finding: Miták., Ch. II., Sec. XI., para. 2; and "that which was given to her by her kindred; as well as her fee or gratuity or anything bestowed after marriage; what is given to a damsel by her kindred, by the relations of her mother or those of her father; the gratuity for the receipt of which a girl is given in marriage; what is bestowed or given after marriage or subsequently to the nuptials:" Miták., Ch. II., Sec. XI., para. 6; Mayúkha, Ch. IV., Sec. X., paras. 2 and 3; and also "what has been received by a woman from the family of her husband at a time posterior to her marriage is called a gift subsequent, and so is that which is similarly received from the family of *her* father. It is celebrated as woman's property:" Miták., Ch. IV., Sec. XI., para. 7. But not property given to a woman with a view to cheating the heirs, or by persons who are strangers in blood to her and to her, husband: Mayúkha, Ch. IV., Sec. X., paras. 6 and 7.

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GIBBS, J., concurred.

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TRIKAM DA'MODHAR *Plaintiff.*

LA'LA' AMI'CHAND *Defendant.*

Wagering Contract—Promissory Note given in payment of Loss on Wagering Contract—Consideration—Act XXI. of 1848—Bombay Act III. of 1865.

A promissory note which has for its consideration a debt due on a wagering contract is not binding in the hands of the original payee.

THE following question was referred for the decision of the High Court by Gopálráv Hari Deshmukh, Judge of the Court of Small Causes at Ahmedábád, under Sec. 22 of Act XI. of 1865:—

"Is a promissory note which had for its consideration a debt due on account of a wagering contract binding?"

"The plaintiff has sued the defendant on a promissory note. The defendant pleaded that the promissory note, though apparently for cash received, was in fact for a debt due on a wagering contract called "*vaidá*." It is satisfac-

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torily proved by evidence adduced by him that it was executed for a sum of money which had become due in consequence of a wagering contract entered into before Bombay Act III. of 1865 came into force.

“ My opinion is that the note is not binding.”

The case came before WESTROPP, C.J., and GIBBS, J.

WESTROPP, C.J.:—The promissory note (dated 17th January 1865) for Rs. 360, payable by instalments, was executed by the defendant in favour of the plaintiff before Bombay Act III. of 1865 came into force, and the Judge has found that the defendant has satisfactorily proved that the note was given by the defendant to the plaintiff in respect of a contract by way of wagering or gaming.

We do not think that the fact that the wagering contract and the note were both antecedent to the coming into force of Bombay Act III. of 1865 affects the question.

The wagering contract itself being, under Act XXI. of 1848, null and void, the promissory note must be regarded as made without consideration. A contract which is itself null and void cannot be treated as a valid one, or any consideration for a promissory note. Accordingly, between the original parties to the note it cannot be enforced: *Leake on Contracts*, p. 378; nor can it be enforced even by an indorsee of the note against the maker of it, if the indorsee did not give value for it. But the burden of proving that the indorsee did not give consideration for it lies upon the maker: *Fitch v. Jones (a)*. In the present case, however, the action is between the original parties, namely, payee against maker, not indorsee against maker; and the maker has proved that the note has been given in respect of a gambling transaction, and, therefore, that it is without consideration as between him and the plaintiff.

The reply to the Judge's question must, therefore, be in the negative, namely, that the note is not binding as between the plaintiff and the defendant, and, therefore, that the present action cannot be sustained.

(a) 5 El. & B. 238; S. C. 24 L. J., Q. B. 293.

*Special Appeal No. 61 of 1870.*1871.
June 26.DAYA'BHA'I DÍPCHAND *Appellant.*DULLABHRA'M DAYA'RA'M *Respondent.*

Contract for Delivery of Shares—Assignment in Equity—Equities on Assignment of Contract—Readiness and Willingness to deliver—Tender—Actual Tender where dispensed with.

A contract for the delivery of shares at a future day is a contract that can be assigned in Equity, and the assignee of such a contract can, in his own name, maintain a suit to recover damages for its breach in the Civil Courts in India.

In such a suit the plaintiff would be subject to any equities that might subsist between his assignor and the defendant.

In order to support an allegation of readiness and willingness to deliver, an actual tender is not in all cases necessary : *e.g.*, a tender will be dispensed with where the defendant has refused to perform the contract, or where on the day for the performance of it he has absconded, and, having closed his place of business, has left no agent or other person to represent him.

THIS was a special appeal from the decision of the District Judge of Súrat, confirming the decree of the Şadr Amín of Súrat.

The plaintiff, Dayábhái, sued Dullabhrám in the Court of the Şadr Amín of Súrat for the recovery of Rs. 1,700, being damages sustained by the plaintiff, by reason of the defendants not taking delivery of twenty-five shares of the Broach Bank and Finance Corporation, Limited. Dayábhái alleged that Dullabhrám had agreed, under a writing dated 7th April 1865, to take delivery of the above shares from one Vrijbhukan Harjivan, and to pay him their price, on or before the 15th of July of the same year, but that he had failed to do so, and that the original vendor (Vrijbhukan) had assigned the contract to the plaintiff, who, therefore, instituted the suit.

The defendant pleaded, among other grounds, that the plaintiff had no right to sue him, as the agreement had not been made by him with the plaintiff; that the contract was a *sattá* (time-bargain) contract; and that the shares were not delivered to him on the appointed day.

The Şadr Amín found that the plaintiff had a right to sue, and that the transaction was not a *sattá* one. But he rejected

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 DULLABHRA'M From this decision Dayábhái appealed to the District
 DAYA'RA'M. Judge of Súrat, who affirmed the decree of the lower court
 on grounds which will appear from the following extracts
 from his judgment:—

“The points for consideration are—1st, Whether the finding of the lower court, that the plaintiff had failed to prove the condition precedent to his right of action, was contrary to the weight of evidence; and 2ndly, Whether there was a right of action in the plaintiff.

“I find on both points in favour of the respondent.

“With regard to the first point, the appellant complains that the lower court found improperly upon the evidence that he had failed to prove his readiness to convey the twenty-five shares in question. I have, therefore, read over the whole of the depositions, and I am of opinion, not only that the Šadr Amín was right in his finding, but that, looking at the *modus operandi* in making the contract, and the manifest falsities in the statements of many of the witnesses, there was never any *boná fide* intention to convey and receive: in fact, the contract was simply what is termed a time-bargain; and the story of the purchase by Vrijbhukan of shares, portions of which have been produced here, is simply a scheme concocted to enable the person who won on the bargain to establish his claim in the Civil Courts. I consider that the finding of the lower court, as to the plaintiff's failure to prove his readiness to convey the shares in accordance with the terms of the contract, was fully warranted by the evidence. With regard to the second point, I can only repeat that in my mind it was not competent to the plaintiff to maintain this action, for the reason that the right residing in Vrijbhukan could not be made the subject of an assignment, either in law or equity. There was apparently no debt or anything substantial belonging to the transferor, but simply a right to legal remedies—in other words, but a mere naked right. I can find no authority in support of such an as-

signment, and it appears to me to be opposed to public policy.

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"I affirm the decision of the lower court, with costs on the appellant."

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Against this decision the plaintiff, Dayábháí, preferred a special appeal to the High Court, on the grounds that (I.) the District Judge was wrong in holding the transaction to be a time-bargain, contrary to the admission of the respondent, and without having framed any issue on that point; that (II.) the plaintiff's assignor (Vrijbhukan) having a certain interest vested in him to recover damages for breach of contract from the respondent, the Judge erred in holding that it was a mere naked right, and, as such, could not be made the subject of an assignment; that (III.) both the lower courts erroneously considered an actual tender of the shares necessary in the case.

The special appeal was argued before WESTROPP, C. J., and GIBBS, J.

Macpherson (with him *Chunilál Mániklál*), for the appellant:—The Judge held the transaction to be a time-bargain not only without any issue having been laid down by him on that point, but in direct violation of the respondent's admission in his deposition (exhibit No. 8) that he did intend to take the shares if they continued to be sold at a premium. As to the assignment of the shares to the plaintiff, Vrijbhukan had a valuable interest, which he was entitled to transfer according to the established principles of equity. [WESTROPP, C.J.:—It is clear that an interest in a contract can be transferred.] Both the lower courts erred in considering that the shares ought to have been actually tendered to the respondent on the day appointed. Vrijbhukan was found to have had in possession as owner a sufficient number of shares on that day, and to have shown his readiness and willingness to perform his part of the contract by giving the respondent a notice in writing on the 9th of July 1865, requesting him to take delivery of the shares. Under these circum-

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stances, an actual transfer was not necessary : *The Imperial Banking and Trading Co. v. Pránjivandás Harjivandás* (a).

Girdharlál Dayáldás, for the respondent :—The lower courts having found as a matter of fact that the plaintiff's assignor (Vrijbhukan) was not ready and willing to offer the shares, this court, sitting in special appeal, is bound by that finding. As for the assignment, the interest under the contract was uncertain, and could not, therefore, be assigned.

Cur. adv. vult.

WESTROFF, C.J.:—The defendant in his deposition (exhibit No. 8) admitted that his intention was to take delivery of the shares (the subject of the contract in the plaint mentioned) if they continued to be sold at a premium and not at a discount. The Şadr Amín laid down as the 3rd issue, whether the said contract was a *sattá* or not—that is to say, whether the provisions of Act XXI. of 1848, which prohibit the maintenance of a suit upon agreements by way of wagering, applied or not. The Şadr Amín determined that issue in the negative, and in favour of the plaintiff. On the occasion of the appeal by the plaintiff to the District Judge, the defendant did not take any objection, under Sec. 348 of the Civil Procedure Code, to the finding of the Şadr Amín upon the said third issue, nor did the District Judge himself lay down any issue as to whether or not the said contract was one within Act XXI. of 1848. The District Judge, therefore, ought not, in and by his judgment in this cause, to have held that the said contract was a time-bargain, upon which the bringing of an action is prohibited by Act XXI. of 1848. The District Judge should also, on the assumption that the said contract is not an agreement by way of wagering or gaming, have held that in Equity it was assignable for a valuable consideration (Spence, Eq. Juris. 852), subject, no doubt (generally speaking), to the equities (if any) which may have existed between the defendant and the original vendor, Vrijbhukan Harjivan (*Ibid.* 863). For instance, if the defendant were entitled to a set-off against

(a) 2 Bom. H. C. Rep. 258.

Vrijbhukan Harjivan, if he had sued the defendant upon the contract, the defendant would in this action, brought by the assignee of the said Vrijbhukan Harjivan, be entitled to the same set-off against the plaintiff (the said assignee) : Leake on Contracts, 604, 605 ; Story, Equity Juris. 1047 ; *Ryall v. Rowles* (b). Circumstances in the conduct of the vendee may have rendered an actual tender to him by the vendor (or his assignee) of the share-certificates and transfer deeds unnecessary. Whether this was so here, the re-trying court will have to consider. It is correctly stated in Leake on Contracts, page 464, that “a refusal to perform the contract by one party, so long as it remains unretracted, discharges the other party from the performance of all acts which he would otherwise be bound by the contract to perform, and so may operate as an excuse for the non-performance of conditions precedent.” In *Ripley v. MacClure* (c) the plaintiff contracted with the defendant for the sale of a cargo of tea, to be delivered on arrival of the ship, to the defendant at a certain price payable after delivery. Before the arrival of the cargo the defendant repudiated the contract and refused to perform it, and it was held that the refusal, not having been retracted, discharged the plaintiff from a delivery of the tea upon its arrival, and rendered the defendant liable for a breach of contract in not accepting the tea without such delivery. In the unreported case of *The Imperial Banking & Trading Co. v. Thákarsi Punjashá and three others*—which was an action for the non-acceptance of three Back Bay shares (and decided on the 23rd of June instant), the vendors had, some time previously to the 1st of July 1865 (the day named in the contracts for the delivery of the shares and payment of the purchase-money), given notice to the purchasers (the defendants), through their agent, to be ready to take delivery on that day and pay the purchase-money, but discovered, when that day came, that the usual place of business of the defendant in Bombay was closed, and that their agent, who had effected the contract on their behalf, and conducted their other business in Bombay for the defendants

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(b) 2 Wh. & Tu. L. C., 670-736, 3rd ed. (c) 4 Exch. 345.

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(who themselves resided at Ahmedábád), had disappeared—it was held at the Original Jurisdiction side of this court that the plaintiffs were not bound to make an actual tender to the defendants or their agent of the share-certificates and transfer-deeds, and that it was sufficient evidence of the readiness and willingness of the plaintiffs to perform their part of the contract to show that on the 1st of July 1865 they had the share-certificates ready for delivery, and also the transfer-deeds ready for execution in favour of the defendants, by the registered owner of the shares, who was then willing to execute those deeds.

This court reverses the decrees of the courts below, and remands the case for re-trial by the Acting District Judge on the merits. On such re-trial he should lay down and determine the following, and such other (if any) issues as the circumstances of the case may require:—

(I.) Whether the contract in the plaint mentioned was duly assigned for valuable consideration to the plaintiff by Vrijbhukan Harjivan previously to the filing of the plaint in his suit.

(II.) If the Acting District Judge shall determine the first issue in the affirmative, let him ascertain whether the plaintiff was ready and willing to deliver the shares, the subject of this suit, in accordance with the terms of the contract.

The District Judge is to be at liberty to permit the parties to give such fresh evidence, oral and documentary, as the above issues and the nature of the case may require, and will make such decree in accordance with his findings on the issues, and such award of costs of this suit (other than the costs of this appeal), as law and justice may require. It may be useful to refer him to the following authorities for his guidance, so far as the points decided in them may bear upon the present case:—*The Imperial Banking and Trading Co. v. Pránjivandás Harjivandás* (d), per Couch, J., as to readiness and willingness; *Maganbhái Hemchand v. Manchhabhái Kalliánchand* (e), per Couch, C.J.; *Parbhudás Pránjivandás v.*

(d) 2 Bom. H. C. Rep. 258, et *ibid.* 265, 266.

(e) 3 Bom. H. C. Rep., O. C. J. 79; et *ibid.* 85, 86.

Rámlál Bhágirath (f) ; The Imperial Banking and Trading Co. v. A'tmáram Mádhavji (g), per Sausse, C.J. ; and Special Appeal No. 117 of 1870 (from Súrat), in which Dayábháí Dípchand, the present plaintiff, was the plaintiff, and Má-níklál Vrijbhukan was the defendant, a copy of the judgment in which must have been transmitted to the Súrat Adálat in February or March 1871.*

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Each party to bear his own costs of this appeal.

Special Appeal No. 124 of 1871.

July 19.

SA'VJI bin SATU *Appellant.*

PATLU and MAHA'DU bin DHA'RU *Respondents.*

Claim on a Bond—Alleged Theft of Bond by Obligees—Plea of Payment—Burden of Proof.

The plaintiff sued on a bond made in his favour by the defendants which he alleged had been stolen by the defendants. The defendants, while admitting the execution of the bond, pleaded payment and that the bond had been returned by the plaintiff to them. They did not produce the bond, nor did they offer any evidence of the alleged payment.

Held that, as the defendants admitted the bond and pleaded payment, the burden of proof of such payment lay on them.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátará, in Regular Appeal No. 155 of 1870, reversing the decree of the Subordinate Judge of Tásgám.

The facts of the case sufficiently appear from the following judgment of the District Judge:—

“The plaintiff's claim was on a bond, dated Ashvin Shudh 1787, for Rs. 300, executed to the plaintiff by the defendants ; no limit specified. Some land, 22 acres and 15 guntás, was in the possession of the defendants, and one-fourth “*vátá*” of the produce of this was promised in lieu of interest, or one-half this land to be placed in possession of the plaintiff. The *vátá* promised was given up to 1788, and then stopped, and the defendants stole the bond, and the plaintiff sued for

(f) *Ibid.*, O. C. J. 69, 78. (g) 2 *Ibid.*, 246, 248, 249.

* *Supra*, p. 123.

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payment, or to have the land placed in his possession, as agreed on, till full payment.

“The defendants said the claim was false ; that they paid off the bond with Rs. 300 and got it back, and now owe nothing.

“The Subordinate Judge of Tásgrám found that the plea of the defendants was not proved, and he decreed for the plaintiff as sued for.

“The defendants, Patlu and Mahádu, appeal :—(I.) Bond not proved. * * * *

“*Issue* :—The plaintiff having pleaded that the theft of his bond by the defendants, while in his hands and still unpaid, prevented its production, does he prove this so as to let in secondary evidence of the bond, or do the defendants prove that they paid off the bond ?

“The only evidence of the theft of this bond is the report of a police *havildár* that, on the complaint by the plaintiff of the theft of a bond from him, he had made inquiry and could find out nothing. The defendants have admitted the existence of the bond, which, they plead, was paid off and returned to them, and the bond not being in the plaintiff's hands, the presumption is in favour of the defendants : for their theft is not proved. If it was proved that the defendants were in any way to be blamed, then the presumption would be against them (*contra spoliatorem omnia præsumuntur*) as wrong-doers ; but as their plea is in accordance with the custom of the country, to get back a bond when it is paid off, that of the plaintiff is, in my opinion, the one requiring proof. The plaintiff's want of possession of the bond is against the presumption that it is still due. All that the plaintiff can urge in regard to the want of the bond is that the defendants stole the bond. Where is his proof of this ? Nothing but a police *havildár's* report that the plaintiff complained of a theft ; which report is not evidence of a theft : and this is all ; while, on the other hand, a reasonable story is told by the defendants, both consonant with daily

custom and common sense; for who would believe that a man would leave bonds where his debtors could steal them? The presumption here is, in my opinion, in favour of the defendants' plea, and as the plaintiff does not prove that his bond was taken away, or show anything to support the assumption that it was stolen, I consider this failure of evidence must count against him, and that the bond must be concluded to have been paid off, as pleaded by the defendants, against whom, therefore, the Subordinate Judge's decree must be reversed—costs on the plaintiff."

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The special appeal was argued before WESTROPP, C.J., GIBBS and WEST, JJ., on the 19th of July 1871.

Dhirajlál Mathurádás, for the special appellant:—The respondents having admitted the execution of the bond and pleaded satisfaction of the debt, the Judge was wrong in not throwing the *onus* of proof upon them.

No one represented the special respondents.

PER CURIAM:—The District Judge was in error in deciding the case on the question of the alleged theft. The execution of the bond was admitted by the defendants, so that no proof of it was requisite. They alleged payment and the return of the bond, but they did not produce the bond, or account for its non-production, nor did they produce any receipt for the money: and, though the burden of proof of payment lay on them, they did not offer any evidence on the point. It further appears that the non-production of evidence (if they had any available) was owing to their own neglect. The Court, therefore, must reverse the District Judge's decree, and uphold that of the Subordinate Judge, with all costs of the suit and of both appeals on the respondents.

Decree reversed and claim allowed.

SLR 2 Bom: p. 2.
SLR 2 Bom: p. 254.
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Regular Appeal No. 55 of 1870.

KESHAVRA'V KRISHNA' JOSHIAppellant.

BHAVA'NJI bin BA'BA'JIRespondent.

Mortgage—Power of Sale—Right of Mortgagee to sell without intervention of Court—Costs—Discretion—Appeal.

As a general rule an appeal in respect of costs will only be entertained in cases in which no discretion has been fairly exercised upon the question, and the decision of the Court below has proceeded upon mistake or misapprehension.

Where *bona fide* care and discretion have been exercised, no appeal in respect of costs should be allowed, and the question whether such discretion has been well or ill exercised should not be entertained.

Semble (per Melvill, J.) that a private sale effected by a mortgagee in the Mofussil without the intervention of a Court, in pursuance of a power of sale given to him under his instrument of mortgage, is invalid.

THIS was an appeal from the decision of Krishnarav Vithal Vinchurkar, Subordinate Judge, First Class, at Sátará.

The appeal was heard by MELVILL and KEMBALL, JJ.

Shántáram Náráyan for the appellant.

Bahiravnáth Mangesh for the respondent.

The facts fully appear from the following judgments:—

MELVILL, J. :—The defendant borrowed from the plaintiff Rs. 644-11-3, bearing interest at six per cent., and executed a deed of mortgage by which he conveyed a house to the plaintiff, and covenanted that in default of payment of principal and interest within four months, the plaintiff might sell the house without notice to the defendant, and apply the proceeds to the liquidation of the debt, any balance which might remain due being recoverable from the defendant with compound interest. The plaintiff was also to account to the defendant for the rents and profits of the house.

The plaintiff has come into court asking for a decree for the principal and interest, and for an order for the sale of the house. This decree and order have been made, but the Subordinate Judge has laid all the costs of the suit on the plaintiff, on the ground that the mortgage-deed gave him a

power of sale, and it was, therefore, unnecessary for him to come into court until he had exercised that power, and found it insufficient for the purpose of recovering the full amount of the debt.

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The plaintiff appeals against the order as to costs, and also against the refusal of the Subordinate Judge to award interest during the pendency of the suit. The defendant has filed an objection under Sec. 348 of the Code, on the ground that, under the terms of the mortgage-deed, he is not liable for interest after the expiration of four months from the date of the deed.

We are always unwilling to admit an appeal on the question of costs. I think that we should adhere to the principle laid down by the Privy Council in *Atterborough v. Kemp* (a), namely, that an appeal in respect of costs should only be entertained in cases in which no discretion has been fairly exercised upon the question, and the decision of the court below has proceeded upon mistake or misapprehension, and that where *bonâ fide* care and discretion have been exercised, no appeal in respect of costs should be allowed, and the question whether such discretion has been well or ill exercised should not be entertained. But, while accepting this as the general rule, I consider that we shall not be contravening it, if in the present case we allow the propriety of the Subordinate Judge's order as to costs to be called into question. To lay the whole of the costs of a suit on the winning party is an extreme measure, which is only justifiable in cases in which a suit may have been wholly unnecessary for the purpose of establishing and enforcing the plaintiff's right. If the plaintiff can show that such an order was made under a mistake or misapprehension of the law, and that the filing of a suit was a necessary proceeding, or, if not absolutely necessary, that it was a reasonable and discreet proceeding, then he is fairly entitled to ask an appellate court to set aside such order.

What I have to consider, then, is whether the Subordinate Judge acted under a mistake or misapprehension as to the

(a) 7 Jur., N. S., 665.

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law, when he held that the power of sale inserted in this mortgage-deed made it clearly unnecessary for the plaintiff to apply for a judicial order of sale.

With a single exception, to which I shall presently refer, I have not been able to find in the reported cases any decisions of the courts in India on the subject of a mortgagee's power to sell, without the intervention of a court, in cases not governed by English law. The English law is, of course, perfectly clear. Not only has the mortgagee the power to sell, without the concurrence of the mortgagor, in cases where such power is expressly given by the mortgage-deed, but by a recent statute such a power of sale is made incident to all mortgages, unless it be excluded or limited by the mortgage-deed.

The case above referred to is that of *Bhuwanee Churn Mitr v. Jykishen Mitr* (b). Although that case stands alone, it is a very valuable authority. It is stated in the judgment of the court to have been a novel and unprecedented case. "It may safely be affirmed," the Judges say, "that no such condition" (i.e., a power of sale given to the mortgagee) "is to be found in any document produced in the Company's Courts, since the Code of 1793 came into operation, between parties contracting in the Mofussil. If, then, respect be had to the universal impression throughout the country, and to the uniform practice of our courts, the presumption must be against the validity of such a stipulation." As it was the first case of the kind, so it appears to have been the last; and Mr. Macpherson, in his work on mortgages (p. 46), accepts the decision in it as settling the present state of the law in Bengal and the N. W. Provinces. The case was very fully argued, Sir J. W. Colvile, then Advocate General, appearing in support of the sale made by the mortgagee under a power contained in the mortgage-deed; and the Judges unanimously held that such a power was repugnant to the spirit, if not to the letter, of the Regulations, and unsuited to the circumstances of this country.

(b) Calc. S. D. A. 1847, p. 354.

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Our Bombay Regulations, like those of Bengal, contain no provision regarding the sale of a mortgaged estate under a power of sale ; for cl. 3 of Sec. xv. of Reg. V. of 1827, referred to by the Subordinate Judge, has no real bearing on the question. If it has any such bearing, it seems to me to indicate rather that a civil suit is necessary, than that a mortgagee may sell the property without a suit. In the present case, as in the Bengal case, the point raised is a novel and unprecedented one. I do not remember ever to have seen a document executed between natives in the Mofussil in which such a condition was inserted, nor do I believe that such a power of sale has ever been exercised in the Mofussil, for if it had been exercised, the question would almost certainly have come before the courts.

I am strongly disposed to agree with the Calcutta Judges as to the impolicy of allowing sales by mortgagees in the Mofussil. The mass of mortgages consists of mortgages of ancestral fields, made by ignorant cultivators to greedy and unscrupulous money-lenders. The great object of the money-lender is to get the land into his own hands, and, when he has succeeded, he is the worst possible landlord, spending nothing on the improvement of his estate, and rackrenting the unfortunate ryot whose proprietary rights have passed from him, but who is willing to slave for the usurer rather than abandon the field of his fathers. When we stand between two classes such as these, it is the borrower, and not the lender, whom we should protect. Any measure which tends to the general transfer of proprietary rights in land from the cultivating to the money-lending classes should, in my opinion, be viewed with the greatest jealousy. We have introduced into our system, to the great benefit of the ryot, the English doctrine of the equity of redemption ; and I am happy to say that this court has determined to adhere to that doctrine, notwithstanding the attempts which have been made to wrest a recent decision of the Privy Council into a weapon for attacking it. But this would be of little use, if we were to allow mortgagees to sell the property, whenever they pleased, without the intervention of a Court of Justice.

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*in I.L.R. 1
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where the
P.C. condemns
the Mad. &
Bon. courts
in not following
their decision.*

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As the Calcutta Judges say: "This court has only to declare such a condition legal, and in the course of a short time not a mortgage-bond would be without it. The mortgagee would then sell his debtor's property to suit his own time, and in such manner and with such publicity and formalities as he thought proper. Fraud, it is to be feared, would frequently accompany the transfers, and the property fall into the hands of the mortgagee or some of his connections at an inadequate price, leaving the lender at liberty still to pursue the borrower for the balance that may remain after the sale:" p. 364.

Of course it may be said that the system has been found to work well in England. That must be presumed to be so: for the courts, which were at first opposed to the introduction of such a system, have long since recognised its validity, and the Legislature has now gone so far as to annex a power of sale to contracts in which the contracting parties have not provided for it. But it does not follow that the system is suitable to other countries, or to this country in particular. The Code Napoleon (Articles 2078, 2090) absolutely excludes it, declaring any stipulation for a power of sale, to be exercised by a mortgagee otherwise than through the court, to be null and void. The nations of Continental Europe generally have, I believe, adopted the same rule (see Story on Bailments, Sec. 309), and a like rule is found in the Code of Louisiana. The notes of the Indian Law Commissioners on the first draft of the Penal Code sufficiently show in what high esteem the Louisiana Code is held by those who have been concerned in legislating for India.

The sale of a pledge by the creditor certainly does not appear to be opposed to the Hindú law. Mr. Colebrooke (Digest, Vol. I., p. 141,* Madras ed., 1864) gives a text of Brihaspati: "When the debt is doubled by the interest, and the debtor is either dead or has absconded, the creditor may attach his pledge, or the debtor's chattel, and sell it before witnesses; or, having appraised it in an assembly of good men, he may keep it ten days, after which, having received

* Bk. I., Ch. III., Sec. 2, Cl. cxxii.

the amount of his debt, he must relinquish the balance, if there be any. Having ascertained his own demand by the help of men skilled in arithmetic, and taken the attestation of witnesses, he commits no offence by thus recovering it." The very next text, however, points to the intervention of judicial authority in such matters : " When the pawner is missing, let the creditor produce his pledge before the King ; it may then be sold with his permission : this is a settled rule. Receiving the principal with interest, he must deposit the surplus with the King." This last text prescribes a process very similar to a decree, and sale under a decree, of court ; and, whatever texts may be found which may seem to authorise independent action of the creditor, it is certain that the usage of the country is opposed to it ; and as a guide to our courts the usage of the country takes precedence of the Hindú law.

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It is perhaps not necessary for the purposes of this suit to decide positively that a sale by a mortgagee, under a power contained in the mortgage-deed, would be void. That question is open to just so much doubt as to render legislation on the subject desirable ; and I am glad to see that the Indian Law Commissioners in their sixth Report propose to legislate in the right direction, if I may venture so to say. The rules proposed by them oblige a mortgagee who desires a sale to obtain it through the agency of a Civil Court, and prevent him from buying the property himself at the court-sale without the leave of the court previously obtained. " We hope," say the Commissioners, " that the artful contrivances by which land is often acquired much under its value by means of the process of foreclosure may thus be checked, and that sales, being made openly under the supervision of the courts, will be fairly conducted." For the purposes of this suit it may be sufficient for me to say that, for the reasons which I have stated, it is extremely doubtful whether the plaintiff could have made a valid sale under the power contained in the mortgage-deed ; that he would have been very ill-advised if he had attempted to exercise a power so novel and of such doubtful

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validity ; and that even if it were not absolutely necessary for him to come into court, he showed a proper and wise discretion in so doing. It follows from this that he is entitled to his costs.

No doubt, if the defendant had shown that he had offered to join the plaintiff in making a conveyance of the property, and was ready to pay any balance which might be due, the plaintiff would fairly have been made to bear the costs. But the evidence on the record, even if reliable, does not prove this, or anything like this. It only shows that two persons who made an offer to buy the property were referred by the defendant to the plaintiff. The sum offered was less than the sum due to the plaintiff, and the plaintiff would certainly not have been bound to part with his security, even if the defendant had joined in the conveyance, unless he thereby obtained full satisfaction of his debt.

I think that the plaintiff is also entitled to interest until the date on which his debt was satisfied, though, on the other hand, he is bound to give an account of the rents and profits up to the same date. The Subordinate Judge has taken the account correctly up to the date of the institution of the suit, so that it only remains to do the same for the period intervening between the date of the suit and the date of payment.

I would, therefore, amend the Subordinate Judge's decree, by ordering that an account be taken of the rents and profits of the mortgaged premises received by the plaintiff between the date of institution of the suit and the date on which the decree of the Subordinate Judge was satisfied ; that the amount found to be owing on such lastmentioned account be deducted from what shall be found to be due to the said plaintiff on account of simple interest at six per cent. accruing due between the same dates ; that the balance, if any, be paid to the plaintiff ; and that if, on the contrary, the amount found to be owing to the defendant on such account of rents and profits be in excess of the sum found to be due to the plaintiff on account of interest, the amount in excess be paid to the defendant. I would also direct

that the defendant bear all costs throughout. In other respects the decree of the Subordinate Judge should be confirmed.

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KEMBALL, J.:—I quite concur in the order it is proposed to make on this appeal as to costs and interest; but as the ground on which my opinion is based differs from that taken by my brother Melvill, and as I am unable to agree with him in thinking it to be a matter of great doubt whether the mortgagee could have made a valid sale under the power given him in the deed, it becomes necessary for me to make a few observations.

N. R. 2 Rem. 1/2.

I agree in thinking that the lower court laboured under a mistaken apprehension of the law in holding that "the institution of this suit simply to enable the plaintiff to sell the house was quite uncalled for," and for that reason saddling the plaintiff with all the costs of the suit; and that this, therefore, is one of those cases in which as regards costs we should entertain an appeal. It appears to me that the Subordinate Judge has misunderstood the rights and remedies of a mortgagee. It is a clear rule that a Court of Equity will not prevent a mortgagee from using all the remedies belonging to his character, and exercising all the powers that are given to him, as and when he pleases, even concurrently (2 Spence 634). A power of sale is only an additional remedy, and on that point—*vide* note e, 2 Spence 634—it was held that it does not interfere with the right of a mortgagee to foreclose. Consequently, it must be held that it was competent to the plaintiff in the present case to bring his action, and, that being so, following the usual rule in suits by mortgagees, he was entitled to his costs.

But assuming for the sake of argument that the only remedy left to the plaintiff under the terms of the mortgage was to sell the property on which his debt was secured, I must confess I see no objection, the ruling of the Bengal Sadr Court notwithstanding, to the exercise of such remedy. The introduction of a power of sale into mortgage-deeds in the Mofussil is, no doubt, to say the least, *unusual*, but I do not understand why on that account it should not be

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exercised; nor am I aware, whatever may be the law in Bengal, that the exercise of such a power is in any way repugnant to either the letter or spirit of our Regulations, it being borne in mind that prior to the ruling in *Rámji v. Chinto* it had been invariably held in this Presidency, where there was an agreement that the right of redemption should be confined to a particular time, that on default made the property in the thing mortgaged passed absolutely. Moreover, I do not understand why the courts should interfere with arrangements fairly entered into between individuals for the purpose of avoiding expense and delay, merely because some possible injustice is dreaded. My own experience teaches me that the professional money-lenders neither desire nor seek to possess themselves of land; and where cases of oppression and fraud do arise, the courts are open to those aggrieved.

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Special Appeal No. 154 of 1871.

BHA'ICHAND bin KHEMCHAND *et al.* *Appellants.*
FULCHAND HARICHAND *et al.* *Respondents.*

Limitation—Reg. V. of 1827, Secs. 3 and 4—Claim for Account by Representative of deceased Partner against the surviving Copartners.

A right to an account claimed by the representatives of a deceased partner in a firm against his surviving partners falls under Sec. 4 of Reg. V. of 1827, and is not a debt within the meaning of Sec. 3 of that Regulation.

A question arose in this special appeal before WESTROPP, C. J., and WEST, J., whether a right to an account, claimed by the representatives of a deceased partner in a firm against his surviving partners, was barred by the old law of limitation in this Presidency, Reg. V. of 1827, Sec. 3, the suit not having been brought until more than six years had elapsed since the date of the death of the deceased partner. The other questions in the case were not of sufficient general importance to be reported.

Shántarám Náráyan, for the appellants, contended that this claim was a debt within the meaning of Sec. 3 of the

abovementioned Regulation, and that the suit was, therefore, barred.

Dhirajlál Mathurádás, for the respondents, argued that this was not so.

WESTROPP, C.J. :—My brother West and I agree in thinking that this claim, for an account of the partnership transactions now made by the representatives of the deceased partner, Moru, against the appellants, his surviving partners, comes not within the meaning of the term “debts” as used in Sec. 3 of Reg. V. of 1827, but rather that it falls under Sec. 4, in which case the suit is within time, as twelve years from Moru’s death had not fully elapsed before the institution of the suit. We are much aided in arriving at this conclusion by a recent decision of the Privy Council, *Syud Tuffazal Hossein Khan v. Raghunath Prasad* (a), where it was held that a possible claim under an arbitration for the settlement of accounts could not properly be attached under Sec. 205 of the Civil Procedure Code, although that section expressly renders “debts” liable to attachment: their Lordships being, of opinion that “a mere expectancy, or a mere right of suit, cannot be attached; that the attachment must operate at the time of attachment, and not be anticipatory, so as to fasten on some future state of property in which the suit may result. The decision of Markby, J., in *Abbott v. Abbott and Crump* (b) appears to rest on the same principle.

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Decree affirmed with costs.

(a) 7 Beng. L. Rep., P. C. 186.

(b) 5 Beng. L. Rep. O. J. 382.

July 25,
August 16.

Referred Case.

PURSHOTAM MANSUKH.....*Plaintiff.*
RANCHHOD PURSHOTAM*Defendant.*

Payment of Debts to Heir of deceased Hindú—Certificate of Heirship subsequently granted—Liability of Debtor to pay a second time—Reg. VIII. of 1827—Act XXVII. of 1860—Act XX. of 1864.

A defendant who is sued by the holder of a certificate of heirship to a deceased Hindú for a debt due from the defendant to the deceased is at liberty to show, notwithstanding the certificate of heirship, that he has paid the debt he owed the deceased to the actual heir of the latter before the grant of the certificate of heirship. It will not, however, be sufficient for such defendant to show that he has paid his debt to a person whom he *bond fide* believed to be such heir.

QUESTION and case submitted by Gopálráv Hari Deshmukh, Judge of the Court of Small Causes at Ahmedábád, for the consideration and orders of the High Court:—

“A man dying, his widow received payment of a sum of money due by a debtor of the deceased. His nephew subsequently obtained a certificate of heirship from the District Judge, and now sues the debtor for recovery of the debt paid to the widow. Can he claim repayment from the debtor?”

“The plaintiff (the nephew of the deceased) sued the defendant (the debtor of the deceased) for the purpose of recovering from him the amount due by him to the deceased. He produces a certificate obtained from the District Judge declaring him to be the heir of the deceased Kushandás.

“The defendant pleaded that he had already paid the money to the widow of Kushandás, knowing her to be the heir of the deceased, before the question of heirship was decided upon by the District Judge.

“The case was decided against the plaintiff by Mr. Mukunrái Munirái, he holding that, as the payment to the widow was made in good faith, and before the certificate of heirship was granted, the defendant (the debtor) could not be obliged to repay the debt to the plaintiff, who, if he chooses, might take steps to recover the same directly from the widow.

“ The plaintiff applied for a new trial, quoting the High Court’s ruling in Special Appeal No. 70 of 1870, decided on the 9th of April 1870 (Vol. VII., p. 31, Part I.). He urged that, according to this ruling, the money must be paid again to the plaintiff by the debtor, the widow having failed in obtaining a certificate. The new trial has been granted, and the case is pending.

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“ My opinion is that the debt should be paid to the certified heir, and not to the widow, of the deceased.”

The question involved in the above case having in the first instance come before MELVILL and KEMBALL, JJ., was by them, on the 11th of July 1871, referred for the consideration of a Full Bench. It was, accordingly, argued before WESTROPP, C.J., and GIBBS, MELVILL, and WEST, JJ., on the 25th of July 1871.

Dhirajlál Mathurádás, for the defendant :—The defendant is entitled to show, if he can, that the person to whom he paid the debt was in fact the heir of the deceased. The certificate of heirship is not conclusive to the contrary : *Shrípat Rámchandra v. Viñhoji Malhárji (a)* ; S. A. No. 185 of 1868 (*Muryá Rágho v. Bábáji Shivrám*), decided 13th June 1868; *Krishnarao Anunt Joshee v. The Collector of Tanna (b)*. If that is so, payment to the heir discharges the debtor from all liability to the certificate-holder.

Nagindás Tulsidás, for the plaintiff :—A certificate of heirship is like a probate, and relates back to the death of the deceased. The defendant cannot, after a certificate has been granted, be allowed to aver that any one except the holder of the certificate is the heir. He cited *Dámodhar Bápuji v. Zingá (c)*.

Cur. adv. vult.

WESTROPP, C.J. :—This case having come in the first instance before my brothers Melvill and Kemball, they referred to a Full Bench the question—“ Whether a debtor of a deceased person who has paid his debt to the widow of the

(a) 4 Bom. H. C. Rep., A. C. J. 178.

(b) 7 Harrington, 312.

(c) 7 Bom. H. C. Rep., A.C.J. 31.

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deceased, holding her to be the heir, is entitled, in a suit brought in a Court of Small Causes for the recovery of the same debt by a person holding a certificate of heirship obtained subsequently to the payment, to show that the widow, and not the holder of the certificate, is the legal heir."

Our brothers Melvill and Kemball add the following remark :—"The plaintiff relies on the case of *Dámodhar Bápuji v. Zingá*. The defendant relies on the decisions in *Shrípat Rámchandra v. Víthoji Malhárji* and *Muryá Rágho v. Bábáji Shivrám* (Special Appeal No. 175 of 1868). We find a difficulty in reconciling the decisions in these cases, and, therefore, refer the question for determination by the Full Bench."

The question has, accordingly, been argued before my brothers GIBBS, MELVILL, and WEST, and myself, by Mr. Dhirájlal Mathurádás for the defendant, Ranchhod Purshotam, the alleged debtor, who paid the debt to the widow of the deceased creditor; and by Mr. Nagindás Tulsidás for the plaintiff, who holds the certificate of heirship to the deceased, and is stated in the reference from the Small Cause Court at Ahmedábád to be his nephew.

Certificates of heirship are given under Reg. VIII. of 1827, which Regulation consists of a preamble and two chapters. The first part of the preamble and the first chapter are what it is important that we should consider in the present case. The first part of the preamble recites as follows:—"Whereas at the same time that it is, *in general*, desirable that the heirs, executors, or legal administrators of persons deceased should, unless their right is disputed, be allowed to assume the management, or sue for the recovery, of property belonging to the estate, without the interference of Courts of Justice, it is yet in some cases necessary or convenient that such heirs, executors, or administrators, in order to give confidence to persons in possession of or indebted to the estate, to acknowledge and deal with them, should obtain a certificate of heirship, executorship, or administratorship from the Zillá Court." What precisely is meant by the

phrase "legal administrators" is not defined. As it must be taken to mean some one different from heir or executor—and evidently, from the context of the preamble, and from Sec. 1, Ch. I., does not mean a person holding letters of administration, or anything equivalent thereto—the phrase probably applies to such a person as the guardian of a minor, or possibly the duly constituted manager of an undivided Hindú family who have inherited from the deceased. The first section is as follows:—"Whenever a person dies, leaving property, whether moveable or immoveable, the heir, or executor, or legal administrator may assume the management or sue for the recovery of the property, in conformity with the law or usage applicable to the disposal of the said property, without making any previous application to the court to be formally recognised."

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These passages clearly show it to have been the intention of the Legislature, in enacting this Regulation, that the heir, executor, or legal administrator (whosoever the lastmentioned may be) might, if so minded, take possession of, or sue for, the estate without any certificate or forensic recognition of his character as heir. And this constantly happened.

Secs. 2, 3, and 4 provide for the obtaining of a certificate of heirship, executorship, or administratorship, as the case may be, by an heir, executor, or administrator "desirous of having his right formally recognised by the court, for the purpose of rendering it more safe for persons in possession of, or indebted to, the estate to acknowledge and deal with him."

It was then, under this Regulation, clearly optional with the heir, &c., whether he should take a certificate or not, and the preamble shows that the Legislature thought that it was "in general desirable" that he should not take such a certificate unless his right were disputed.

Let us suppose the case of an undivided Hindú family of three sons of the deceased. The eldest, as is generally though not invariably the custom, assumes, without opposition from the others, the management of the estate, and obtains

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payment of some of the debts due to the deceased, and dies within six months. The second next assumes the management, also without opposition, and obtains payment of some more of the debts of the deceased, and dies within three months. It cannot be denied that these payments to the eldest and second sons of the deceased were, at the time of making them, valid payments. The third son, who has been absent from home for some years, returns, and succeeds to the management of the estate, but, finding some difficulty in persuading the remaining debtors to the estate of the original deceased to recognise his title, obtains from the Zillá Court a certificate of heirship to the deceased, as he would be lawfully entitled to do. Not satisfied with suing those remaining debtors, he brings actions against the former debtors, who had paid their debts to his eldest and second brothers. It would be scarcely possible to contend that these latter defendants should not, under this Regulation (which in its preamble recites that it is "in general desirable" that the heir should, and in its first section enacts that he may, assume the management or sue for the recovery of the property, without applying for a certificate of heirship), be at liberty to show and maintain *non obstante* the certificate of heirship granted to the third son of the deceased, that they had respectively paid their debts to heirs of the deceased authorised by Hindú law to give a good acquittance. Another case might be that of the guardian by law (Muhammadan or Hindú) of a minor who, after the decease of the minor's father, enters into possession, on behalf of his only son, of the property of the deceased, without a certificate, but in his capacity of a guardian (by Hindú or Muhammadan law) of the minor, or, as the Regulation styles it, as legal administrator, and on his behalf, and in that capacity receives payment of a debt due to the deceased and dies during the minority, and the next person entitled to the guardianship obtains a certificate as legal administrator, and sues the party who has already paid his debt. It cannot be that the Legislature intended that the new legal administrator, although furnished with a certificate under the Regulation, should be at liberty to compel the defendant to pay the money twice over.

Again, there might be two executors of the deceased, of whom one may have acted as executor in the *Mofussil*, without probate or certificate, and received payment of a debt due to the deceased, and died. The other may then have obtained a certificate, and sued the former debtor. The Regulation would justify the defendant in pleading payment to the deceased executor.

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Lastly, take the case of the widow of one of three Hindú brothers, who dies childless and separated in estate from his brothers. The widow, on her husband's death, enters into possession and management of his estate as his heir, as she is well entitled to do, and obtains payment of a debt due to him, but subsequently she is persuaded by the surviving brothers to accept maintenance, and to make over the estate to them, and they, without opposition, obtain a certificate of heirship, under Reg VIII. of 1827, to the deceased brother. It would be flagrant injustice, and contrary to the preamble and first section of the Regulation, if to an action by the holders of that certificate against the person who had paid the widow, he could not plead and show payment to the widow as heir.

Many other cases could be suggested in which justice would be set at nought, were the certificate of heirship to be permitted to overreach and invalidate a payment of prior date. An examination of that part of the Regulation which states what shall be the operation and force of the certificate, is, we think, conclusive in establishing that the certificate shall not so relate back to the death of the deceased as to prevent an alleged debtor from showing that he has made a valid payment to another person, who actually was heir of the deceased at the time of the payment. Sec. VII., cl. 1, enacts that "An heir, executor, or administrator, holding the proper certificate, may do all acts and grant all deeds competent to a legal heir, executor, or administrator, and may sue and obtain judgment in any Court in that capacity:" and cl. 2 proceeds thus: "But as the certificate confers no right to the property, but only indicates the person who, *for the time*

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being, is in the legal management thereof, the granting of such certificate shall not finally determine nor injure the rights of any person, and the certificate shall be annulled by the Zillá Court upon proof that another person has a preferable right. The words "for the time being," used in this section, are most important, and satisfy us that there was not any intention whatsoever upon the part of the Legislature to invalidate payments made prior to the date of the certificate, to any person who, either as heir, or executor, or legal administrator, was, at the time of such payments, entitled to receive them from the debtors of the deceased. The case of *Shrípat Rámchandra v. Víthoji Malhárji (d)*, which has been relied upon for the defendant, is not precisely in point. It was not, like the present, a case between the holder of a certificate of heirship and an alleged debtor of the deceased, averring payment to another person as heir of the deceased, but was an action brought to recover lands by the alleged vendees of the holder of a certificate of heirship against a defendant, alleging himself to be the vendee of a person other than the holder of the certificate, which other person the defendant asserted to have been the heir of the deceased owner. The Assistant Judge held the certificate of heirship to be *primá facie* proof of title in the plaintiff's vendor, but Couch, C.J., and Newton, J., held his decision on that point to be wrong, and remanded the case for re-trial. And no doubt this decision of Couch, C.J., and Newton, J., was perfectly correct, as Sec. VII., cl. 2, of the Regulation expressly provides that the certificates shall not confer any right to the property; and the question there was, "In whose vendor did the title lie?" Another case cited for the defendant, *Muryá bin Rágho Pátíl v. Mádhavráv Rámchandra Shirgámkar* (Special Appeal No. 185 of 1868), was also not in point, the suit being one by the alleged heir of a deceased mortgagor to redeem a mortgage, and Warden and Gibbs, JJ., held that the District Judge was wrong in treating the certificate of heirship produced by the plaintiff as *primá facie* proof of his heirship in such a suit.

(d) 4 Bom. H. C. Rep., A. C. J. 178.

As to *Dámodhar Bápuji v. Zingá (e)*, cited for the plaintiff, and which was before Gibbs and Lloyd, JJ., and *Dámodhar Bápuji v. Rávjí*, decided by Couch, C. J., and Warden and Gibbs, JJ. (*f*), those were cases in which debtors who had paid the widow of the deceased creditor, after she had obtained an order for a certificate of heirship under Reg. VIII. of 1827, but before the certificate had issued, were held liable to pay over again to the brother of the deceased creditor, who succeeded in obtaining from the High Court a reversal of the order of the District Court, which had directed a certificate of heirship to be issued to the widow, and afterwards obtained such a certificate, of which he was the holder when he sued the respective defendants. We have examined as well the records as the reports of those cases, and find that the defendants relied upon an allegation that the widow, Ján-kibái, to whom they had paid the debt, was at that time the *sole manager* of the deceased Náro's estate, but they did not venture to allege or contend that she was heir, and in fact chiefly relied on the order which she had obtained from the District Court, directing that a certificate of heirship should be issued to her; and the Division Courts, in both of these cases, seem to have viewed Dámodhar Bápuji as undisputed heir of the deceased, and certainly we do not understand either of those courts as holding that the defendants were precluded from showing, if they could, that the widow was heir of the deceased at the time the payments were made.

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It is worthy of notice that neither the repealed Act XX. of 1841, nor Act XXVII. of 1860, nor Act XX. of 1864 (Sec. 2), which are all (and especially the last) more stringent enactments than Reg. VIII. of 1827, makes any declaration or provision that payment of debts made to an heir, executor, or legal administrator of the estate of a deceased person previously to the grant of a certificate under any of these Acts, shall be in any wise invalidated by such grant. On the contrary, Sec. 1 of Act XX. of 1841 and Sec. 2 of Act XXVII. of 1860, although respectively providing that on

(e) 7 Bom. H. C. Rep., A.C.J. 31.

(f) *Ibid.*, A.C.J. 32, note.

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debtor of any deceased person *shall be compelled* in any court to pay his debt to any person claiming to be entitled to the effects of any deceased person, except on the production of a certificate under such Act, or of a probate or letters of administration, make this important salvo, “ unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, not from any reasonable doubt as to the party entitled,” which shows that both of these enactments contemplate valid payments to parties not the holders of any certificates.

In speaking of the earlier of those enactments (XX. of 1841, Sec. 1), Peel, C.J., in *Ramdoss v. Gooboo Churn Sein (g)*, says : “ It is very difficult to understand what the Legislature precisely meant, or indeed to put any satisfactory construction upon the Act. It does not purport to displace altogether the right, which a Hindu or Mahomedan representative ordinarily has, independently of probate or letters of administration. If that had been intended, the object would have been effected by simply enacting that no representative title should be valid for the purpose of suing until confirmed by probate or letters, or the ‘ certificate ’ mentioned in the Act. The object of the Act seems to be to give protection in certain cases to parties indebted to Hindu or Mahomedan estates ; the question is, to what cases does the protection extend, and how is the protection to be applied ? The words cannot be construed literally. A man who does not pay because he is unable to pay can scarcely be said ‘ to withhold payment from either fraudulent or vexatious motives,’ though there might be no doubt whatever of the title of the claimant in the present case ; however, we think that there was a *bonâ fide* though groundless doubt. The court looks more to the *animus* of the party than the substantiality of his objection. A *bonâ fide* doubt may be raised, though the facts on which the doubt is founded may be altogether erroneous, or the law utterly mistaken.”

Enactments, such as Sec. 3 of Act XX. of 1841 and Sec. 4 of Act XXVII. of 1860, that the certificate “ shall be con-

(g) 2 Taylor & Bell, 53, 54.

clusive of the representative title against all debtors to the deceased, and shall afford full indemnity to all debtors paying their debts to the person in whose favour the certificate has been granted," do not affect such a question as that which arose in the Court of Small Causes in this case, which is whether the defendant still is a debtor to the estate of the deceased? If, before the granting of the certificate of heirship to the plaintiff, the defendant paid a person who at the time of the payment was the lawful heir, or executor, or legal administrator of the deceased within the meaning of Reg. VIII. of 1827, the defendant was not, at the time this suit was brought, a debtor to the estate of the deceased.

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We think that the question referred to the Full Bench in the present case must be answered in the affirmative, and that the defendant is at liberty to show, notwithstanding the certificate held by the plaintiff, that the widow of the deceased was, at the time of the alleged payment by the defendant to her, the legal heir to the deceased Kushandás Bhagvándás. It will not be enough for the defendant to show that he believed the widow to be so, or to be the manager of the estate of the deceased; he must show that she then was the actual heir-at-law of the deceased. The view which we have taken of Reg. VIII. of 1827 may occasion inconvenience, *e.g.*, a conflict of opinion between various courts. But any other view might have involved injustice of grave character, and would, we think, have been inconsistent with the language and spirit of the Regulation.

In *Maguire v. Denham* (h), decided in the King's Bench in Ireland in 1835, letters of administration to a deceased person were, as in case of actual intestacy, granted to one Marshall. The defendant made a *bonâ fide* payment to him on account of a debt due to the deceased. Subsequently a will made by the deceased, and in which no executor was named, having been produced, the letters of administration to Marshall were revoked, and letters of administration *cum testamento*

(h) 10 Ir. L. Rep. 240.

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annexo were granted to Maguire. In an action by him against the defendant, it was held that the payment on account to Marshall, the first administrator, was valid ; and that Maguire, the second administrator, could recover the balance only. *Bevan v. Lloyd* (i), decided by the C. P. in Ireland in 1848, involves the same doctrine, showing that the first administration was voidable and not void ; that the mesne acts of the first administrator, if done in due course of administration, were valid ; and, lastly, that it lies upon the party impeaching those acts to show that they were not so done. The case of *Woolley v. Clark* (j) differed from those cases, inasmuch as the executor of the first will, who sold the goods of the testator, had previous notice of the existence of a later will, also appointing an executor, who caused the court to revoke probate of the first will, and to grant him probate of the second will, and then recovered from the first executor the value of the goods sold.

Having answered the question referred to us in the affirmative, we remit this case to the Division Court for final disposal.

The Division Court, on receiving the above answer from the Full Court, finally disposed of the case by passing the following order on the 22nd of August 1871, in answer to the reference :—

“In accordance with the accompanying judgment, the Judge of the Small Cause Court should be informed that the plaintiff is entitled to recover, unless the defendant can show that the widow of his deceased creditor is the legal heir.”

(i) *Ibid.* 228.

(j) 5 B. & Ald. 744.

*Special Appeal No. 205 of 1871.*1871.
July 19.SHEKH IBRA'HIM valad SHEKH LA'DLI MIYA'. *Appellant.*PARVA'TA' valad HARI *Respondent.**Oral Evidence to prove a Written Contract inadmissible—Registration—Act XX. of 1866—Admission in a Deposition.**L. K. B. ...
H. R. B. ...*

A written contract can only be proved by the production of the writing itself, and if the document is inadmissible from want of registration, no secondary evidence of the contract can be received.

A party's admission as to the contents of a document not made in the pleadings, but in a deposition, is secondary evidence, and cannot supply the place of the document itself.

THIS was a special appeal from the decision of the Assistant Judge of Solápur (A. C. Watt) in Regular Appeal No. 24 of 1871, reversing the decree of the Subordinate Judge of Bársi.

The plaintiff sued to recover possession of a field No. 121, and a well situate therein, and stated that he had let them to the defendant for three years, but that the defendant declined to vacate them at the expiration of the period.

The defendant pleaded that he held two bonds from the plaintiff under which the property was to continue with him till the debt was paid off.

The Subordinate Judge of Bársi found that the plaintiff, according to the terms of the contract between him and the defendant contained in the bond (exhibit No. 8), was not entitled to recover the property till the debt due on the bond was satisfied, but allowed the plaintiff's claim, as the bond was not registered, and, therefore, not admissible in evidence.

In appeal the Assistant Judge remanded the case, and directed that the defendant should be at liberty to give oral evidence of his right to hold the property.

The following is an extract from his judgment :—

"I am clearly of opinion that No. 8 must be registered to be receivable as evidence in respect to the immoveable property which forms the subject of this suit, and, therefore, the Subordinate Judge is right so far in not receiving it as evidence. I would, however, mention that, in accordance with Full Bench Ruling, Vol. XII., p. 11, Sutherland's Weekly

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Reporter, the document would be admissible as respects the money part of it.

“ On the second issue, I find that the defendant should have been allowed to prove by oral evidence what his right of occupancy is to the land, and in support of this view I rely on the case reported in Calc. W. Rep., Vol. IX., p. 351. The Subordinate Judge has wholly discarded the defendant's right, because No. 8 was not registered ; and, unless there be a provision of law that all contracts must be reduced to writing, it is clear that oral evidence is admissible to prove any contract, and the Subordinate Judge should keep in view the distinction between the actual contract itself and the evidence of it. Exhibit No. 8, although in common speech called a contract, is not strictly so, but is only evidence of the contract which is engrossed upon it. In this case the defendant not being allowed to produce oral evidence is clearly inequitable. It is admitted on both sides that the defendant is in actual possession of the land, and it is also admitted that his possession is that of a tenant of the plaintiff. In No. 8 there is an agreement that the termination of the tenancy is dependent upon the plaintiff paying the defendant a certain sum, and the plaintiff in exhibit No. 36 admits this contract. This document (No. 8) is not receivable as evidence by Act XX. of 1866, and this being so, it appears to me the clear duty of a Court of Equity was to ask the plaintiff whether he did agree that the defendant's tenancy was to continue until the debt was paid. If the plaintiff admit this, then the decision of the Subordinate Judge is erroneous on the merits. If the plaintiff deny this, then the defendant should have an opportunity to lead oral evidence to prove his contract and the terms of his tenancy. I must, therefore, remand the case under Sec. 354, for the determination of the following issue :—

“ Does the defendant hold the land as a tenant of the plaintiff until the plaintiff pay him the sum of Rs. 200 ? ”

On the receipt of the case with the further evidence desired, the Assistant Judge reversed the decree of the Subordinate Judge, and threw out the plaintiff's claim.

The special appeal was argued before MELVILL and KEMBALL, JJ., on the 19th of July 1871.

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Nánábhái Haridás, for the special appellant:—The Assistant Judge was wrong in holding that oral evidence was admissible to prove the contents of the bond (exhibit No. 8), the same being inadmissible as evidence under Act XX. of 1866. The only evidence of importance for the defendant being that bond, and that being inadmissible, the lower court was wrong in not disposing of the case on that preliminary point, as the Subordinate Judge had done.

Bhairavnáth Mangesh for the special respondent.

PER CURIAM :—It is admitted that the plaintiff is entitled to recover the land, unless the defendant can make out a right to retain the land as mortgagee. The agreement as to the mortgage having been reduced into writing, it can only be proved by the production of the writing itself, and the document is in this case inadmissible from want of registration. The defendant cannot be allowed to produce secondary evidence of the contract, and the plaintiff's admission, made not in the pleadings, but in a deposition, is merely secondary evidence, and cannot supply the place of the document itself. On this ground, the Court reverses the decree of the lower appellate court, and restores that of the court of first instance.

Costs on the defendant throughout.

Decree reversed.

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Special Appeal No. 16 of 1871.

THE COLLECTOR OF SU'RAT.....*Appellant.*

DA'JI JOGI *et al.*.....*Respondents.*

Chirdá Haks—Prescription—Acquisitive Prescription—Limitation—Continued Voluntary Payments—Reg. V. of 1827, Sec. 1.

A prescriptive right to have a yearly payment made by Government to a private individual cannot be acquired by reason of a continued series of voluntary payments made to him by Government extending over a period of more than thirty years.

Thus where Government paid a yearly sum of Rs. 32-4-6 to a *Chirdá Hakdár*, by whom no services in return were rendered, from the year 1818 to 1860, and then discontinued such payment to the heir of the last holder, it was held that such yearly payments gave the *hakdár* no prescriptive rights against Government.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of the District of Súrat, reversing the decree of the Assistant Judge at that station.

The plaintiffs sued to establish their right to a *chirdá hak* of Rs. 32-4-6 per annum, which they alleged their family had received from 1818 to 1860, when, their brother Shankar Jogi dying, the Government, on the recommendation of their officer on special duty, ordered its discontinuance.

The Collector, the defendant, answered that *chirdá hak* was a service *hak*; that the service was no longer required, and that the Government was, therefore, justified in discontinuing the *hak*.

The Assistant Judge allowed the Collector's objection, and gave a decree in his favour, which was upheld in appeal, on the ground that the plaintiffs had no right of action against Government in respect of the *hak*.

This decree was reversed in special appeal by the High Court, which remanded the cause for trial on the merits.

On the hearing of the appeal the District Judge settled the following issues :—

I. Is there any legal obligation on Government, irrespective of the length of time during which this *hak* has been paid by it, to continue the payment in perpetuity, or as long as it continues to pay the *todá girás hak* ?

II. Does the fact of this payment having been made, as is admitted, from 1818 to 1860, create a prescriptive right, as against Government, to the continuance of such payment?

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On the first issue the District Judge found in the negative. He was of opinion that when the agreement was made by the Government with the *girásiás* to pay them their *girás* from the Government Treasury in consideration of their resigning their right of levying it directly, Government did not stipulate for the payment of the *chirdá haks*, and they were, therefore, not bound to continue it any longer.

On the second issue Mr. Newnham found for the *chirdá hakdárs*. He said: "The rights of the latter were secured to them by the *chits*, or *sanads*, 70, 71, and 72, and these were grants by the *girásiás* in perpetuity on condition of performing the service of collection. These have never been formally cancelled, and no mention appears to have been made of them when the *girásiás* agreed that their dues should be collected by the Government and paid to them from the Treasury; they (the *chirdá hakdárs*) would seem to have been left to make their own terms with the Government. The *girásiás* had created an incumbrance on their estate of the *toḍá girás* dues, in the shape of the right of collection, and of receiving commission for the same, by *sanads* which have not been revoked, and when the Government received those dues into its hands, as trustees for them, it must be held to have so taken them with the incumbrance created by the *girásiás*."

And finding further that the plaintiffs derived their right from the family of Rájsang, whose sons were declared life-grantees, he made a decree giving them also an estate to that extent.

The special appeal was heard by GIBBS and WEST, JJ.

Dhirajlál Mathurádás (Government Pleader), for the appellant:—There being no obligation to pay the *hak* to the *hakdárs*, each yearly payment made by Government to them was purely voluntary. The repetition of a voluntary payment, even though it be for a period of more than thirty years, does not create a prescriptive right to have such

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payment continued for ever. The origin of the payment being ascertained, no presumption can be raised from long enjoyment. A *chirdá hak* is in the nature of moveable property : no payment has been made in respect of it since 1860, and the plaintiff's claim is, therefore, barred.

Nánábhái Haridás, for the respondents : —The payment was not voluntary, and was not even alleged to be so by the defendants in their written statement. A payment of a *todá girás hak* for a long period raises a presumption of permanence. The same rule should be applied to *chirdá haks*. It was held in *Umedsangji v. The Collector of Súrat* (a) that where Government has paid a *todá girás hak* to a *girásiá* for a long and uninterrupted period of time, the *onus* of proving that the *hak* is not perpetual lies upon Government. The payment to the holders of *chirdá haks* for such a length of time as sixty years implies that it was received and paid as of right. The Collector has admitted that the *girás hak* in this case has been continued for the life of its present recipients, and the *chirdá hakdárs* cannot be deprived of their rights for that period at any rate. The nature of the arrangement between the *girásiá* and the Government has not been shown ; but, whatever it was, it cannot affect the *chirdá hakdárs*, who were not parties to it.

Dhirajlál Mathurádás, in reply :—The decision in *Umedsangji v. The Collector of Súrat* does not apply. The Government was a trustee for the *girásiás*. There is no agreement here from which a trust arises. The payment was purely voluntary.

The judgment of the Court was delivered by

WEST, J. :—The facts established in this case, and the historical records available for reference, are too meagre to enable the court to come to a completely satisfactory decision as to the legal position and rights of *chirdá hakdárs* in Gujarrát before the introduction of British rule in that province. This much only appears certain, that the *chirdádárs* were employed by the *girásiás*—whose own claims are of such

(a) 7 Bom. H. C. Rep., A. C. J. 50.

ambiguous origin—to collect their dues from the villages over which their right or their power extended. On the establishment of the British Government the direct collection of the *girás haks* was disallowed. The Government itself undertook the collection of the impost where it was recognised, and paid over the proceeds, in some cases under agreement, in others without it, to the *girásiás* whose title it admitted.

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The collection of *girás haks* by the claimants themselves and their retainers having ceased, the duty of the *chirdádárs* ceased with it, but the Government continued the payment to the latter of an amount equal to that of their previously accustomed percentage for many years. The payments in the present case appear to have been made from 1818 to 1860. It is admitted at the same time that no agreement was ever entered into between the Government and the plaintiffs by which the former bound itself to continue the payments to the latter in perpetuity, or for any definite period. The contention of the plaintiffs is that each single payment during forty-one or forty-two years constituted, in the absence of explanation, a fresh admission of the plaintiffs' legal right to the *haks* in question; and thus a prescriptive title has been established by a continued enjoyment extending beyond a period of thirty years. For the defendant it is answered that no acknowledgment of right is to be deduced from a bare payment; that no prescriptive title has grown up from a succession of acts each of which was purely voluntary; and that no legal right to the payment, as against the Government, having been made out by evidence, the claim ought to be rejected.

The District Judge's view was that the *girásiás*, by their dealings with the *chirdádárs*, had created for the latter a vested interest in their share or percentage of the *girás haks*, and that the Government, having itself undertaken the collection of these *haks*, was bound to pay the share due to the *chirdádárs* out of its collections. The rights, however, of the *chirdádárs*, if rights they really were, could not be affected by any agreement or arrangement between third parties. If they had a vested interest in the *haks* the

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property, subject to that interest, of the *girásiás*, that interest remained just the same after the agreement by which the Government and the *girásiás* came to terms as before. What they say is that they were entitled to levy the *haks* and deduct a percentage. This right, if it subsisted, they might have insisted on, notwithstanding the new arrangement. If it was denied, they might have established it at law. If it was admitted, they might have made it the basis of an actual contract. But it cannot be said that by the mere payment any right, much less the right alleged by the plaintiffs, has been admitted, further than as to the payments actually made. It cannot be said of an individual payment without more that it involves an admission of any right beyond that to the payment itself. To make it evidence of a further right, it must be taken with other extrinsic circumstances constituting, by logical inference or by some rule of law, proof of the right asserted.

This brings us to the question of prescriptive title set up in this case. The Government made annual payments to the plaintiffs for more than thirty years. The enjoyment thus long continued in the plaintiffs constituted, it is urged, a prescriptive title binding the Government to the continuance of the payment for all time to come, or, at any rate, for the period during which the *girás* payments shall be continued on which the *chirdá hak* was originally a charge. The latter part of this argument hardly needs separate consideration. The plaintiff relying on the mere repetition of the payments as itself constituting a valid title, and those payments, by the admission of the defendant, not being referable to any temporarily existing right now expired or extinguished, the claim to them, if good at all, is good in perpetuity. If the payment unexplained of sums of money annually for more than thirty years can create a right to them which did not exist at the inception of the practice, that right has here been created by the acts of the Government.

The plaintiffs, in support of the right, point to Reg. V., Sec. 1, of 1827. What that enactment says is that "when-

ever lands, houses, hereditary offices, or other immoveable property have been held" for more than "thirty years by any person as proprietor.....such possession shall be received as proof of a sufficient right of property in the same."

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It is not necessary now to consider whether the Regulation was meant to afford legislative recognition to any doctrine of acquisitive prescription—was anything more, in fact, than a simple Limitation Act, making lapse of time an answer to claims, but not a foundation for claims. The words we have quoted do not extend to the particular case before us. Here there has not, in any intelligible sense, been possession of anything whatever, nor has there been an actual and active performance and enjoyment of the functions and emoluments of an hereditary office as such. We have, for the purposes of the present inquiry, to deal with the bare fact of payments—on no acknowledged right and not connected with the performance of any duties—continued for more than thirty years. If on this basis a prescriptive title can be built up, it must be simply by analogy to the rule prescribed by the Regulation, not by any possibility of comprehending the case within its positive terms.

Von Savigny, in the course of his profound investigation of the theory of prescription, shows that the idea of prescription as a direct source of rights—that is, of acquisitive prescription—is quite foreign to the Civil Law, from which it has been evolved by the fallacious generalisations of modern commentators. Its true sense, as he demonstrates, was as an exception or means of defence independent of the original merits of the case. A most dangerous consequence of the false doctrine, he shows, is that, taken in its full extent, it includes all cases of the exercise or non-exercise of a right, even those in which the positive law ascribes no particular effect to the mere lapse of time. That rights in general can be created, independently of express rules, by the mere lapse of time, he proves to be an idea resting on no sound principle, and, as an instance of the false conclusions to which it leads, he gives the case of payment of interest on a supposed obligation for thirty years being taken as affording a prescriptive basis for the obligation itself.

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The English law of prescription is neatly summarised in Shelford's Real Property Statutes, p. 25 *et seq.* From this it will be seen that prescription in that law signifies an individual right, or rather the source of an individual right in immemorial usage, which right attaches to the person or to the estate. From such immemorial usage a presumption arises of a grant once made upon which it was founded. A title to lands or other corporeal substances cannot be made by prescription. On account of the formalities essential, especially those formerly essential, to a valid transfer in the case of such property, "more certain evidence may be had," and supersedes the mere usage which is the only mode of enjoying an incorporeal hereditament. Thus "prescription by immemorial usage," it is said, "can in general only be for incorporeal hereditaments which may be created by grant," as distinguished from corporeal property, in which livery of seisin and retention of possession are possible.

The immemorial usage necessary to ground a title by prescription could, however, be satisfactorily proved in only a few of those cases in which it had actually subsisted. Perceiving this, and moved by an instinctive sympathy in favour of long possession, "the courts have interpreted an enjoyment of an incorporeal right for the period of forty years, or even twenty years, unless rebutted by other circumstances, as presumptive evidence that the right has subsisted time out of mind, and consequently, unless its origin could be proved, a sufficient foundation for establishing a prescriptive right." But the principle prevailing as amongst private persons was always qualified as regards the Crown by the maxim "*Nullum tempus occurrit regi.*" This Lord Hobart calls especially "the King's plea:" because, although it is but reasonable that private persons should lose the rights which they have long disused, it would not be just that the King (and through him the public) should suffer in the same way through the negligence or corruption of public officers whose duties and interests may tend in contrary directions. By some Acts of Parliament the Crown's powers of recovery are expressly limited like those of private persons, but where this is not

the case the prerogative is not touched by mere general words. Thus where even an actual enjoyment of an incorporeal hereditament had been continued for centuries as of right, the holder helping himself to that to which he was, or was supposed to be, entitled, the Crown, according to the English Common Law, could still step in, and, as would be said in this country, "resume the *hak*" or "*inám*," unless a grant could be produced or proved, which grant, if in derogation of public right, must have been made on good consideration, as of the concession of a right of passage as a ground for a grant of tolls.

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An incorporeal hereditament is defined as a "right issuing out of a thing corporate, whether real or personal, or concerning, or annexed to, or exerciseable within the same." This definition is not expressed with scientific accuracy, but what it points to is evidently the exercise of rights over property recognised in its bulk as owned by another. It cannot be said that the receipt of money paid on no claim or acknowledgment of a right over any particular corporeal property falls within this notion. Such a payment then is of the nature of a simple annuity, perhaps a purely optional allowance, paid from year to year. On such a bare payment or series of payments traced definitely to its origin forty years back, it is clear that a prescriptive title to payment for ever, or even for one year more, cannot be built up, according to the English law.

As to the Hindú law on this subject not much need be said, as it was not relied upon in argument on either side. That law appears not to dwell on the distinction between possession and the exercise of rights unconnected with possession. The lapse of *Smártakála*, or the period to which the memory of man extends measured by three generations, reckoned equal to a hundred or to sixty years (Stokes's *Hindu Law Books*, p. 31; Colebrooke, *Dig.*, Bk. V., T. 395), appears to give an absolute title to one in possession or in enjoyment of a right, but though three descents cast furnish *prima facie* evidence of title to the thing possessed, yet this is not at all an indisputable presumption. Nilkantha, in the

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Vyavahāra Mayūkha (Ch. II., Sec. II., 1), says approvingly :
“Narada declares the imperfection of (right in) the thing contested when supported by enjoyment only : ‘He who simply pleads possession but no title, in consequence of proving such false possession is to be considered a thief.’”
Here there was not possession of anything, nor enjoyment, on an acknowledged claim of right : no ground, therefore, for the establishment, as against the Government, of a right to payment in future.

From whatever direction, therefore, we approach this question, no title by mere prescription appears to have been made out. It may be a subject for some regret that the Government should, by continuing the payments for so long a period, have encouraged the notion, which was almost certain to spring up, that they were made in performance of a legal duty, not of mere grace ; but the mere fact of payment to a man of that to which he is not entitled is never in itself an injury, so as to afford him a just ground of complaint when the payment afterwards ceases. It is only as raising in certain cases a presumption of the existence of a right, of which other evidence, through the lapse of time, is not forthcoming, that the frequent repetition of acts such as payments, when unexplained, becomes in effect, though incidentally, the foundation of rights. Here there is no room for such a presumption : the title, if there be one, may be traced back as well as the payment ; and we must reverse the decree of the District Court, with costs throughout on the respondent.

Decree reversed.

*Special Appeal No. 291 of 1871.*1871.
Nov. 20.VA'SUDEV DA'JI *Appellant.*BA'BA'JI RA'NU *Respondent.**Estoppel—Landlord and Tenant—Payment of Rent admitted—Tenant's Right to dispute Title of Landlord.*

If the existence of a tenancy be established by the fact of the tenant's payment of rent to his landlord or otherwise, the tenant cannot ordinarily dispute the title of his landlord in a suit brought against him for recovery of possession. He must first give up possession, and then, if he has any title *aliunde*, that title may be tried in a suit of ejectment against the landlord.

THIS was a special appeal from the decision of R. F. Mac-tier, Judge of the District of Satará, confirming the decree of the Munsif of A'sthá.

The plaintiff sued to recover a piece of land from the defendant, alleging that his agent, Ganesh, had let it on a lease for three years to the defendant, who, though the term mentioned in the lease had expired, refused to vacate. The plaintiff also alleged that his agent had sued the defendant in the Mámlatdár's Court for rent of the same piece of land on the identical lease, which was found proved, and had recovered judgment.

The defendant denied the plaintiff's title, and, asserting his own, alleged that the land had been mortgaged by his father to the father of the plaintiff in 1807, but released in 1852. He produced two cancelled mortgage-bonds in support of his allegation. In a deposition, however, given by him in the course of this suit, the defendant admitted that ever since the Mámlatdár's decree he paid rent regularly to the plaintiff.

The court of first instance rejected the claim, and the court of appeal arrived at the same conclusion. They both considered the evidence bearing on the genuineness of the plaintiff's lease unsatisfactory, and pronounced it to be a forgery.

The special appeal was heard by MELVILL and KEMBALL, JJ.

Bahiravnáth Mangesh, for the special appellant:—The Mámlatdár's court was a court of competent and exclusive

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jurisdiction for the trial of rent-suits, in which it had to determine whether or not a contract of tenancy, expressed or implied, existed, and whether or not the defendant was the plaintiff's tenant: Reg. XVII. of 1827, Sec. xxxi., cl. 3; *Bái Mahálakshmi v. Andhyáru Keshavráam Narsiráam* (a). Judgment of a court of exclusive jurisdiction directly upon the point is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose: *Duchess of Kingston's Case* (b). The judgment of the Mámlatdár obtained by Ganesh, about whose managership there was no dispute in the lower court, is such a judgment. It cannot be disputed in this, and is conclusive. The effect of not considering this conclusive is to allow the tenant to dispute his landlord's title, recognised by a judicial decree. He must first put an end to his tenancy by giving up possession, and then if he has any title *aliunde* have it tried in ejectment: *Doe d. Knight v. Lady Smythe* (c). The District Judge has, moreover, found that the defendant has not explained the fact of his having paid rent; and, as long as he has not done so, he cannot retain possession: *vide* Smith's L. C., Vol. II., pp. 757-759.

There was no appearance for the special respondent.

MELVILL, J.:—It is to be regretted that the respondent is not represented before us, but in his absence we are obliged to come to the conclusion that the decree in his favour cannot be sustained. There seems to have been no dispute in the court of first instance as to the authority of Ganesh to act as manager for Vásudev. In regard to the existence of a tenancy, we find that not only was a decree for rent made and enforced against the defendant by the Mámlatdár in 1863, but in his deposition given in the present suit in 1868 the defendant admits that he has ever since paid rent regularly to the plaintiff, and he offers no explanation whatever of his having done so. Without deciding positively what may be the legal effect of the Mámlatdár's decision, we think that the defendant is concluded by the unexplained

(a) 2 Bom. H. C. Rep. 185, 2nd ed.

(b) 2 Sm. L. Ca. 679 (6th edn.). (c) 4 M. and S. 347.

payment of rent from disputing the plaintiff's title in the present suit : *Cooper v. Blandy* (d), *Doe d. Marlow v. Wiggins* (e). The defendant must give up possession to the plaintiff, and then if he has any title *aliunde*, that title may be tried in a suit of ejectment brought by him against the present plaintiff : *Doe d. Knight v. Lady Smythe* (f).

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 DA'JI
 v.
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 RA'NU.

The decrees of the courts below are reversed, and the claim allowed. Costs on the respondent throughout.

Decrees reversed.

Special Appeal No. 316 of 1871.

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 Nov. 23.

DA'MODHAR TULJA'RA'M *Appellant.*
 LAÏLU KHUSA' LDA'S *Respondent.*

Attachment of Property of third person—Action ex delicto—Trespass.

A judgment-creditor who attaches property which does not belong to his judgment-debtor commits a trespass, for which he is responsible in damages, even though he may have acted without malice and mistakenly.

THIS was a special appeal from the decision of W. M. P. Coghlan, Judge of the District of Tháná, reversing the decree of the Subordinate Judge at Bassein.

The claim in the original suit was to recover damages on account of unlawful and wrongful detention by the defendant of the plaintiff's personal property, namely, a boat. The plaint set forth that the defendant wrongfully caused the plaintiff's boat to be attached in execution of his decree against one Degin ; that the plaintiff had contracted to sell the boat to one Naoroji for Rs. 1,325, but that the plaintiff being unable, in consequence of the attachment, to deliver the boat to Naoroji within the stipulated time, the latter recovered damages from him for the delay ; and that when the boat, on being released from attachment, was sold by a public sale, the price it fetched fell short of the price agreed upon by Naoroji by Rs. 510.

(d) 1 Bing. N. C. 45. (e) 4 Q. B. 367. (f) 4 M. & S. 347.

1871.	The plaintiff estimated his damages as follows :—	
DA'MODHAR	Damages paid to Naoroji	Rs. 351 0 0
TULJA'RAM	Loss at public sale	„ 510 0 0
v.	Interest at one per cent. on Rs. 1,325	„ 138 10 0
LALLU		
KHUSA'LDA'S.		<u>Rs. 999 10 0</u>

The defendant, Lallu, answered that his judgment-debtor, and not the plaintiff, was the owner of the boat, and that he (Lallu) was not liable in damages.

The Subordinate Judge at Bassein found that the real loss sustained in consequence of the attachment amounted to Rs. 285, to which he decreed the plaintiff entitled. He also awarded interest.

Mr. Coghlan disallowed the entire claim, on the ground that no action lay. The following is an extract from his judgment :—“The defendant, Lallu Khusáldás, having obtained a decree of the court against his debtor, Degin, attached a boat in Degin's possession. It turned out afterwards that the boat at the time really belonged to the plaintiff, to whom on inquiry the court made it over. The boat had formerly been Degin's property. There is no allegation of malice, or that the defendant, Lallu, knew, or had reason to believe, that the boat was not still the property of Degin, as it had formerly been. The plaintiff may have suffered loss, but legally there has been no injury, the defendant's conduct having been that of a reasonable man carrying out a decree of a court in the usual manner.”

The special appeal was heard before MELVILL and KEMBALL, JJ.

Shántáram Náráyan, for the appellant :—The view of the lower appellate court as to the law of wrongs is erroneous. This was an action *ex delicto*. The tort alleged was a tort to personal property. This kind of tort is distinguished into two classes—torts to personalty in possession, and torts to personalty out of possession. In this case the lower court holds it to be an admitted fact that the judgment-creditor, Lallu Khusáldás, attached and seized the boat in his judgment-debtor Degin's possession, whereas exhibit No. 41—

which is a judgment between the present parties, passed when the special appellant applied for the removal of the attachment, and the recovery of the property, under Sec. 246 of the Code of Civil Procedure, and is, therefore, conclusive—shows that the contrary was the fact, namely, that the boat was in the possession of the special appellant. I am entitled to speak of the tort alleged in this case as of a tort to personalty *in possession*. Now the seizure of a boat caused to be made by Lallu, as the judgment-creditor of Degin, was clearly a trespass. It was a direct wrongful interference with property in possession, or, as Broom describes it (Commentaries, 3rd ed., p. 789), it was “a tort to personalty in the possession of the owner constituted by the wrongful deprivation of that possession.” It was not at all necessary that there should be any malice, or any allegation of it, or any knowledge as to who was, or who was not, the owner. Apart from all malice, even an innocent person may be guilty of trespass, and liable to be sued for it—even madmen and infants having, in the eye of the law, no immunity from the consequences of a trespass. Nor, in accordance with the practice of all courts, was there any protection to the attaching creditor, or even to the Sheriff or the Názar, from the fact that the seizure was effected in the prosecution of a court’s order in the execution of a decree. In England such actions are constantly brought against the Sheriff, and there is no reason why the person who procured the trespass at the hands of the officer who stands in the place of the Sheriff, namely, the Názar, should not be responsible for what he caused to be done.

Ráv Sáheb Vishvanáth Náráyan Mandlik, contra :—The court below finds that the boat was in Degin’s possession. Indeed it notes it as an admitted fact. If it was in Degin’s possession, the judgment-creditor was quite justified in seizing it as the property of his judgment-debtor, Degin, although it afterwards proved to be the property of another, and was thereupon restored to that other, namely, the plaintiff in this case. There was no wrong here. The case of *Davies v. Jenkins* (a) shows that if the wrong man have been served

(a) 11 M. & W. 745.

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with the writ of summons, and sued as the defendant, much inconvenience and some pecuniary loss may thus be entailed upon the defendant, yet he has no remedy. This is a case of *bonâ fide* mistake in which no legal wrong is involved.

The judgment of the court was delivered by

MELVILL, J.:—We are unable to agree with the District Judge in holding that the plaintiff has no cause of action. We think that a judgment-creditor who attaches property which does not belong to his judgment-debtor commits a trespass, for which he is responsible in damages, even though he may have acted without malice and mistakenly. We do not know that there has been any previous decision of this court on the subject, but it has been discussed at length and determined by the Calcutta Court in *Mussamut Subjan Bibi and others v. Sheikh Sariatulla (b)*. We reverse the decree of the District Judge, and remand the case in order that it may be determined what damages the plaintiff has sustained: costs to follow final decision.

Decree reversed and case remanded.

—

Nov. 24.

Special Appeal No. 358 of 1871.

BA'LKRIISHNA' GOVIND GA'DGIL.....*Appellant.*

NA'RA'YAN SAKHA'RA'M *et al.**Respondents.*

Mál Land—Assessment—Survey—Forfeiture.

A person who fails at the Survey to take up *mál* land, which he held without assessment before the Survey, and allows it to be taken up by another cultivator who pays the assessment upon it, must be held to have forfeited his claim to such land.

THIS was a special appeal from the decision of George Ayerst, Acting Assistant Judge at Tháná, confirming the decree of the Munsif of Bhivadi.

The plaintiffs sued to prevent the defendants from obstructing them in their enjoyment of a piece of land, Survey No. 66, alleged to be the *mál* attached to a field called "Tullái."

(b) 3 Beng. L. R., A. J. 413.

The defendant, Bákrishná, answered that the land did not belong to the "Tullái" field; that its original owner was one Kondgá Mhár, who sold it to one Hírásing, from whom the defendant purchased it, and that he had been in possession thereof ever since his purchase in 1865. The other defendants either corroborated the story of Bákrishná, or denied any knowledge of the sales.

The court of original jurisdiction awarded the claim, and the court of appeal also did the same.

The special appeal was heard by MELVILL and KEMBALL, JJ.

Shántáram Náráyan, for the appellant:—It has been held that *mál* land not taken up at the Survey is forfeited, and may be given away to any one for purposes of revenue: see *Náná Dhogu Pátíl v. The Collector of Tháná and another*, S. A. No. 6 of 1864, decided by FORBES and COUCH, JJ., on the 13th of September 1864.

Bahiravnáth Mangesh appeared on behalf of the special respondent.

The judgment of the court was delivered by

MELVILL, J.:—We do not think that the circumstances of this case have been sufficiently investigated, and, therefore, remand it for reconsideration and a new decision. From the plaint it would appear that the land in dispute, which is *mál* or *ráb* land, and forms a separate Survey number, No. 66, has not been entered in the plaintiff's name since the Survey, but that it was then entered in the name of Kondgá Mhár, through whom the defendant says that he derives his title; and it is now entered in the defendant's name, as appears from the receipt-books put in by him. The defendant also alleges that the plaintiff has never paid the Government assessment (which was for the first time imposed on the *mál* land at the Survey), but that it has been paid by him (defendant) and those through whom he claims. The Assistant Judge has considered this point immaterial, but it is really of great importance. The decision of the Acting Judge of Tháná in Appeal Suit No. 413 of 1862, dated 17th July 1863, and which was affirmed by this court in Special Appeal No.

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1871. 6 of 1864, shows that a person who fails at the Survey to
 BA'LEKRISHNA' take up *mál* land which he held without assessment before the
 G. GA'DGIL Survey, and allows it to be taken up by another cultivator
 v. who pays the assessment upon it, must be held to have for-
 NA'RA'YAN feited his claim to such land. It does not appear whether this
 SAKHA'RA'M had happened in the present case. This is a point into which
 et al. the Assistant Judge should inquire, and we think that he
 should also reconsider the other evidence. It is to be ob-
 served that the deed of sale, exhibit No. 3, speaks of the *mál*
 land of the field "Tullái" as being on the south of the field,
 while in the plaint the land claimed is stated to be to the
 north of the field "Tullái."

Decree reversed and case remanded.

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August 7.

*Special Appeal No. 180 of 1871.*

BA'PU RA'M PARBHU ..... *Appellant.*  
 VISA'JI CHANDO SAKTANEKAR ..... *Respondent.*

*Joint Kabuláyatdárs—Exclusive Collection by one Kabuláyatdár—  
 Prescription.*

Where a *kabuláyatdár* collected Government revenue for more than thirty years, the *kabuláyat* being signed each year by his co-*kabuláyatdár* as well as by himself, it was held that by so doing he had not, under the circumstances, acquired a prescriptive right to collect the revenues to the exclusion of his co-*kabuláyatdár*.

THIS was a special appeal from the decision of A. Lyon, Assistant Judge of Ratnágiri, in Regular Appeal No. 462 of 1868, confirming the decree of the Munsif of Kharepátan.

The plaintiff was the hereditary *Kulkarni*, and the defendant the hereditary *Gámkar* or *Mirási*, of the village of A'chrá. The village is partly *inám* and partly the property of Government, and the revenue collected is payable in part to the temple committee, as managers of the *inám*, and partly to Government.

The plaintiff brought this action to recover from the defendant certain money which the plaintiff had a right

to collect, but which the defendant had collected. The money collected was the revenue due by the *dhárekari*s of the village.

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The Munsif found that the plaintiff alone had the right to collect the revenue, and, therefore, awarded his claim.

In appeal the Assistant Judge confirmed the decree, and recorded the following reasons for his decision :—

“ On the first issue I think that originally both parties had a right to collect. The principal evidence of this is the fact that both execute the *kabuláyats*.

“ On the second issue I am of opinion that the plaintiff has had exclusive enjoyment of the right for thirty years as owner, and has, therefore, acquired a prescriptive title. Throughout the case there is no evidence of collections by the defendant. Every item collected up till the date of this dispute was collected by the plaintiff. The deposition No. 26, made in 1841, shows clearly that the *Kulkárñi* then, and for several years before that, exclusively collected the rents. The defendant himself therein says : ‘ The plaintiff takes the rents and all responsibility for profit and loss ; I don’t take any of the rents.’ Before the defendant could speak of this practice as customary, it must have continued for some years. That the defendant did make this statement is, I think, sufficiently established, considering the date of the document, by the evidence of the *Aval Kárkun*, No. 81, and the *Kárkun*, No. 74.

“ I affirm the decree with costs.”

The special appeal was argued before MELVILL and KEMBALL, JJ., on the 7th of August 1871.

*Dhirajlál Mathurádás*, for the special appellant :—The Assistant Judge was wrong in holding that thirty years’ collection of the revenue by the plaintiff previously to the institution of the suit was sufficient to constitute a prescriptive right in his favour. Such collection is, by the defendant signing the *kabuláyat*, proved not to have been adverse.

*Shántárám Náráyañ* for the special respondent.

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PER CURIAM:—The Assistant Judge has found as a fact on the first issue that both parties originally had a right to collect the revenue. On the second issue he has found that the defendant has lost this right because he has not exercised it for thirty years. The finding on this point is not very satisfactory, for the Assistant Judge has mistaken the date of exhibit No. 26, which is 1856, and not 1841. But even supposing that the actual collections have been made by the plaintiff for thirty years, we do not think that the defendant has thereby forfeited his right. The fact that he or one of his family has all along executed the *kabuláyats* jointly with the plaintiff shows a continuous assertion of his right by the defendant, and an admission of it by the plaintiff. It is argued before us that the defendant's signature to the *kabuláyats* was allowed as a mere honorary distinction, and imports nothing; but this is inconsistent with the Assistant Judge's finding that the defendant's family originally had as much right to collect the revenue as the plaintiff's family. There is no doubt that, as an ordinary rule, joint *kabuláyatdárs* make themselves jointly responsible for the Government revenue, and, as a necessary consequence of their liability, have an equal right to manage the village; and it would be very difficult to hold that one of two *kabuláyatdárs* who collects a portion of the revenue does so illegally. He is, of course, responsible to his partner for the due application of the money received, but it is difficult to see how he can be made to refund it as money had and received for his partner's use. We think that the decrees of the courts below must be reversed, and the claim disallowed with costs.

*Decrees of lower courts reversed.*

*Special Appeal No. 480 of 1869.*1871.  
Nov. 7.PITA'MBAR DHA'RI..... *Appellant.*SAMBHA'JIRA'V ..... *Respondent.**Boundary Dispute—Revenue Survey—Bombay Act I. of 1865—Bombay Act II. of 1866—Act III. of 1846.*

"Boundary dispute," as used in the Survey Act (Bombay Act I. of 1865), means a contention between two neighbouring land-proprietors as to where a boundary line or boundary marks has or have been fixed by the Survey officers. After the functions of the latter officers have ceased in a district, the Collector, acting under Act III. of 1846, is the proper officer to determine such a dispute, and fix the proper position of the boundary marks.

But where a landholder claims to recover from a neighbouring holder land alleged to have been usurped or encroached upon by the latter, the person aggrieved must file his plaint in court (which in the case of a claim for mere possession may be the Court of the Mámlatdár or the ordinary Civil Court), where the determination of the Collector as to the proper position of the boundary line or marks (although it of itself confers or withdraws no right of possession) affords valuable evidence in adjudicating upon the rights of the parties.

THIS was a special appeal from the decision of A. C. Watt, Acting Assistant Judge at Puná, annulling the decree of the Munsif of Talegám.

In his plaint the plaintiff, Pitámbar Dhári, alleged that he owned a piece of land, Survey number 12, in the village of Wágoli, *tarf* Haveli, in the district of Puná, and that the defendant, Sambhájiráv, by disturbing the boundary stones fixed to divide his own field from that of the plaintiff, had thereby encroached upon the land of the latter, and prayed that the boundary stones might be restored to their original position, and that the land thus encroached on might be made over to his possession, with the trees standing thereon.

The defendant stated that part of the land claimed was the property of Government, and part his own; and that the boundary stones had been disturbed by the plaintiff himself.

The court of first instance awarded the claim of the plaintiff as prayed for. The court of appeal held that the suit was clearly one of the nature of a boundary dispute, and as such, under Sec. 3 of Bombay Act II. of 1866, should be dealt with under the provisions of Bombay Act I. of 1865.

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The special appeal was argued on the 5th of June 1871, before WESTROPP, C. J., and WEST, J.

*Dhirajlál Mathurádás* (Government Pleader), for the appellant:—The question is solely one of jurisdiction. The view of the Assistant Judge is wrong, as the case does not fall within the scope of Bombay Act I. of 1865. The powers of the Survey officers expire in a year after the settlement (Sec. xiv., cl. 4), and the Act applies to land formerly settled (Sec. 3). The Civil Courts then regain jurisdiction in cases of encroachment: *Bápuji v. Raghunáth* (a). Before Reg. XVII. of 1827, the Civil Court undoubtedly had jurisdiction in boundary disputes (Sec. 31). This may be gathered from cl. 6 of that section. The Regulation transferred the jurisdiction of boundary disputes to the revenue courts. It is now repealed, and the object of Bombay Act II. of 1866 was to retransfer suits in general to the Civil Courts. Act VIII. of 1859, Sec. 1, gives the Civil Courts jurisdiction in all except certain prohibited classes of cases. The parties cannot call on the Government to appoint a Survey Officer to settle the boundary under Bombay Act I. of 1865. There is, therefore, no tribunal except the Civil Courts to which, in such cases as the present, the aggrieved person can have recourse.

Supposing the District Court to have been correct in its view that there was no jurisdiction, it ought to have transferred the suit, or caused it to be transferred, to a Revenue Court, under Act XVI. of 1838.

*Shántáram Náráyan*, for the respondent:—By Bombay Act II. of 1866, the jurisdiction of the Revenue Courts in boundary disputes was abolished. The Civil Courts were invested with a jurisdiction restricted by the exception at the beginning of Sec. 2, extending only to the cases specified in the same section. Sec. 3 gives jurisdiction to the Survey officers under Bombay Act I. of 1865.

The plaint does not set forth anything but a boundary dispute.

*Cur. adv. vult.*

(a) 6 Bom. H. C. Rep., A. C. J. 12.

November 7th. The judgment of the court was delivered by

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WEST, J.:—The appellant in this case, suing as plaintiff in the court of first instance, complained that the defendant, who is here the respondent, by transferring the stones set down to mark the boundary, had included within his own field a strip of land six cubits wide, properly belonging to the field of the appellant. The suit was for the recovery of this land, with four trees growing upon it, by the restoration of the boundary to its former position.

The respondent answered that a portion of the land sought by the plaintiff was the property of Government, forming part of the demarcating strip between the two properties of himself and the appellant. The remainder, he averred, was his own. The disturbance of the boundary stones, which he admitted had occurred, had been made, he asserted, by the plaintiff himself, with a view to encroachment upon the land of the defendant.

It was asserted by the plaintiff that he had made two ineffectual applications to the Mámlatdár, and this was not denied by the defendant, part of whose case indeed was that the plaintiff's land, having been measured, had been found in excess, and that the result was a decision confirming "the boundary mark as before"—that is, we apprehend, in a way favourable to the defendant.

Upon this the plaintiff brought his suit in the court of the Munsif of Talegám. The Munsif pronounced partly in favour of his claim, but this decision the Assistant Judge, in appeal, annulled, on the ground that, as the contention was of the nature of a boundary dispute, the jurisdiction of the Civil Court was excluded by Bombay Act II., Sec. 3, of 1866. The ground of the present special appeal is that the view of the law taken by the Assistant Judge was a mistaken one, because the suit, besides the establishment of the boundary, was brought to remove the defendant from his usurped possession of a portion of the plaintiff's land and of his trees.

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There can be no doubt, upon the wording of Bombay Act II. of 1866, that it was not intended to include boundary disputes amongst those subjects the judicial cognisance of which was transferred by the Act from the Revenue to the Civil Courts. The enumeration in the preamble is of "cases relating to the rent of land, and the use of wells, tanks, water-courses, and roads to fields." In Sec. 2, by which jurisdiction is given to the Civil Courts, the cases mentioned are precisely the same, and in Sec. 3 it is expressly provided that "all disputes regarding boundaries shall be dealt with in accordance with the provisions of Bombay Act I. of 1865." Therefore, if any class of suits can be pronounced to fall properly and reasonably within the meaning of the expression "disputes regarding boundaries," for such suits a tribunal must in the first instance be sought under the provisions of Bombay Act I. of 1865, and to the same Act we must look for the nature and effect of any order or decree passed according to the rules which it prescribes.

The late learned Chief Justice of this court has pronounced an opinion, in which most of those who have given attention to the subject will be ready to concur, that "it is not easy to say what is a boundary dispute"—that is, as distinguished from a suit for ejectment, or to repel interference with possession. It would seem, indeed, that the two classes of cases are not divided by any unvarying line of separation; that they overlap one another as it were; and that to assign any particular suit to the one or to the other is frequently a matter rather of convenience than of judicial principle. Amongst the parallels which a study of various systems brings to light, not the least curious is that of the same difficulties as to the proper treatment of boundary disputes having arisen under the Roman Law as those with which we have at this day to deal, almost two thousand years later, in the Presidency of Bombay. That law provided that contiguous estates should be demarcated by a strip of land serving as a pathway to both, and incapable of acquisition by any prescriptive title. The determination of disputes regarding its proper position was at first assigned to skilled arbitrators, discharging in this

respect much the same function as officers of the Revenue Survey under our system. Then, however, came the question of what properly fell within the cognisance of these arbitrators. It was answered by limiting their function in deciding disputes to the cases of usurpations not extending beyond the strip of land serving as a boundary. At a later period it was attempted to make them final judges in all questions of encroachment. Then their powers were restricted, again extended, and lastly they were made consulting surveyors, giving evidence in all limitroph cases to an ordinary tribunal which disposed of such cases, except that all title by prescription was excluded, in the same way as of other land disputes.

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It is perhaps possible from this comparison to forecast with a good deal of probability the course which the law in this Presidency is likely to take in ultimately settling the tribunal before which boundary disputes are to be taken for adjudication. In an early stage of progress such disputes lead to frequent and violent affrays. They require prompt decision. Local knowledge is essential to a just determination of them; and the means of placing such knowledge at the disposal of a distant court are but imperfectly developed. The revenue dependent on the cultivation of the land suffers by any insecurity of tenure. These considerations seem to furnish a reason for the endeavours, to which our Government has been almost unconsciously prompted, to make the revenue officers' voice decisive of boundary disputes, while the new conditions, introduced by advancing civilisation, make such a method of adjudication harmonise less and less with the general working of the judicial system.

Under the Hindú system boundary disputes seem to have been regarded by the authors of the Institutes of Manu (VIII., 246 *et seq.*) and Yájñavalkya (II., 150) as embracing cases of encroachment. Elaborate rules are laid down for demarcating villages and establishing permanent indications of their proper limits, some of which, handed down by tradition, are embodied in the Bombay Survey Rules and in Act I. of 1865. The *pátíl* was in later times bound to bring



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about an understanding, if possible, between contending neighbours (Reg. I., Sec. 67, of 1808), and the superintendence of the higher revenue officer extended to this as well as his other duties. These powers of adjustment probably received a very liberal interpretation, which, indeed, was quite in accordance with the ideas of the people. In 1827, Reg. XVII. expressly gave the cognisance of boundary disputes in the first instance to the Collector (Sec. xxxi., Art. 5). Reg. VI. of 1830 enabled him to transfer the investigation of such suits to his Assistants. Act XVI. of 1838, while handing over a portion of his jurisdiction to the ordinary courts, expressly reserved his powers in boundary cases (Sec. i., cl. 3). But in none of these enactments is any definition of what is a "boundary dispute" to be found. It may be gathered, from the separate provisions made in the first and last of them, that a boundary dispute was regarded by the Legislature as something distinct from a suit for possession, but how the distinction for practical purposes was to be drawn was not laid down. This was left for the courts to do, and the late Şadr Adálat favoured the jurisdiction of the Collector. In the case of *Antajee Krishna v. Sono Sudasev* (b), a claim apparently by two *khots* to land, as being included properly within the boundaries of their village, but encroached on under pretence of its belonging to the neighbouring village, was held to have been rightly disposed of by the Collector as a boundary dispute. Another case (p. 151) of the same nature was disposed of in the same way, on the ground that it involved a boundary dispute cognisable by the Revenue Court. The same principle seems to have guided the decision at 4 Bom. H. C. Rep., A. C. J. 167, where also there was a mixed case of possession and disputed boundary. It may be gathered from these decisions that where a contention could be broadly described as a boundary dispute, the late Şadr Court and, following it, the High Court were prepared to support the Collector's jurisdiction, though a question of the right to possession, itself cognisable by the ordinary courts, incidentally arose in it.

(b) 1 Morris, 155.

As the operations of the Revenue Survey spread over the Presidency, the officers of that department disposed (perhaps at first without any strictly legal authority) of innumerable petty boundary disputes, and the rules under which they proceeded received definition and legislative sanction in Bombay Act I. of 1865. By this Act the powers of the Survey officer are strictly limited to the time of the survey and assessment, and to operations connected therewith (Secs. 8, 11, and 13). For such purposes he may settle a boundary, if disputed, "according to the village records, or, failing these, according to occupation as ascertained from the village officers, the cultivators of adjoining lands, or other evidence" (Sec. xiv., cl. 2). An appeal (Sec. xiv., cl. 3) to the superior officer is allowed (Sec. 9) if made within six months, and the Superintendent of Survey may alter the boundaries for twelve months after the introduction of the survey—cl. 4. From that time forth he is *functus officio*, and even the charge of the boundary marks, as an executive duty, devolves (Sec. 46) on the Collector.

The proviso in clause 4 of Sec. xiv. of the Survey Act is important. By it "the determination of any boundary under this section shall not debar any one claiming any right in the land from any legal remedy he would otherwise have for dispossession." It follows that the settlement of a boundary dispute under this section was not intended to have that conclusive effect, as to an incidental question of possession (as distinguished from a question of title), which had been assigned by the Şadr Court to a Collector's decision under Act XVI. of 1838 and Reg. XVII. of 1827. For the disposal of such questions so far as they related to mere possession, a substantially new tribunal, the Mámlatdár's Court, had been created by Bombay Act V. of 1864. A decision of that court, or of the Collector's Court under the Regulation and Act XVI. of 1838, might, as against his neighbour, determine a ryot's actual holding by a boundary different from that laid down for revenue purposes by the Survey officers, though the two were intended to coincide, \* and

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\* Joint Report, para. 17.

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would in general be made to coincide by a fresh adjustment of the survey boundary under the 4th clause of Sec. XIV., Bombay Act I. of 1865.

The term "boundary dispute" had thus, for the purposes of Bombay Act I. of 1865, assumed a much narrower sense than before. Its settlement could no longer dispose of a question of possession, but was rather made dependent on the adjudication of the latter. This was as to such disputes arising in the progress of a survey. For disputes arising before the commencement of a survey, or more than a twelve-month after its completion, the Act makes absolutely no express provision. The Collector's powers under Reg. XVII. of 1827 and Act XVI. of 1838 still subsisted, and these, it is probable, were thought sufficient for the disposal of any cases that were likely to arise. Accepted in the latitude given to them by the Šadr Adálat, they undoubtedly were so.

Then, however, came Bombay Act II. of 1866. By this the enactments giving the Collector jurisdiction in boundary cases were wholly repealed. At the same time such cases, as we have seen, were excepted from the enlarged jurisdiction conferred on the ordinary Civil Courts, and to supply the extinguished jurisdictions no other provision is made than that all boundary disputes shall be dealt with in accordance with the provisions of Bombay Act I. of 1865. As to the boundary disputes before a survey, that Act makes no provision. As to disputes in the course of a survey its provisions have been considered. In the case before us the survey was completed, as is admitted, several years ago. It is, under Sec. 3 of the Survey Act, "in force subject to the provisions of this Act;" but amongst those provisions there is not one for the judicial disposal, in a case like the present, of a question of disputed boundary. The only section which really bears on the subject is Sec. 46, under which, and under Act III. of 1846 of the Government of India, the Collector has power to enforce the maintenance and repair of boundary marks. We must not suppose that by boundary disputes in Act II. of 1866 the Legislature intended a class of contentions for which absolutely no provision is

made in the Act to which it refers for their settlement. We must rather reduce the sense of this vague and fluctuating phrase within such limits that the two Acts may be consistent and, as far as possible, coöperative. There may be a complaint by A that B has damaged or deranged the boundary marks fixed by the Survey officers.\* B denying this statement, a contention arises, which may properly be termed a boundary dispute. It is one which the Collector can dispose of in the exercise of his powers as an executive officer, under Secs. 46 and 12 of the Survey Act, by enforcing the replacement or repair of the marks. "Boundary dispute" is thus reduced to a contention as to where the boundary had been fixed. Its determination may afford valuable evidence for a Civil Court, but of itself confers or withdraws no right of possession. On the other hand, though a Civil Court may have determined that a certain strip of ground is the property of A as against B, the Collector may insist that the survey boundary shall be maintained so as to sever such ground from the remainder of A's holding, and compel him to settle for its revenue, if at all, through B. This is certainly a narrow sense of the words "boundary dispute," but it is an intelligible one; and as it is the only one accordant with the remedy provided †, it is the sense in which we must accept those words. Taking the words thus, the Collector still has a beneficial and independent function to perform, but his orders establish no right which can clash with the decision of a Civil Court on a claim for possession or of title. He who wishes a boundary line or mark to be restored must apply to the Collector; he who desires to recover land usurped by his neighbour must file a plaint in court, which in the case of a claim for mere possession, according to the ruling in *ex parte Nagová* (c), may be either the Mámldár's or the ordinary Civil Court. This view of the question is consistent with that taken by the court in a case already referred to—*Bápuji Balvant v. Raghunáth*

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\* Survey Rule 22.

† By Act I. of 1865, Sec. 35; Survey Rules 5 and 12.

(c) 3 Bom. H. C. Rep., A. C. J. 108.

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*Vithal* (d). There the Chief Justice said "the question is whether there is any encroachment, for if so the Civil Courts will have jurisdiction;" and it seems clear that, dealing with such a case as a boundary dispute, the Collector can no longer give any remedy beyond an order that certain stones shall be set up in certain places, or certain mounds repaired.

In the case before us the plaintiff sought both a restoration of boundary marks and a restitution of land. The former complaint was one for the disposal of the Collector as a boundary dispute, in which he is interested for the Government, and which he has authority and special means to deal with; the latter is a suit for ejectment within the cognisance of the Civil Court. The Civil Court, therefore, must determine whether or not the plaintiff is entitled to recover the land alleged to have been encroached upon by the defendant, although that court cannot finally decide the contention as to the proper place of the boundary marks, and although what that place is may be an incidental point, which it is important that the court should consider.

The Court, accordingly, reverses the decree of the Assistant Judge, and remands the cause for retrial on the merits. Costs to abide the final decision.

*Decree reversed and case remanded.*

(d) 6 Bom. H. C. Rep., A. C. J. 72.

*Regular Appeal No. 37 of 1871.*1871.  
Nov. 8.

PREMSHANKAR RAGHUNA'THJI.....*Appellant.*  
 THE GOVERNMENT OF BOMBAY .....*Respondent.*

*Service Lands—Jurisdiction—Civil Courts—Resumption of Service Lands—Act (Bombay) VII. of 1863—Local Legislature, Powers of—Regulation of Mofussil Courts.*

Cl. 4 of Sec. II. of Bombay Act VII. of 1863 (an Act for the summary settlement of claims to exemption from the payment of Government land revenue) enacts that no suit or action between Government and the holders of \* \* \* any lands held for service in regard to the tenure of such lands shall be entertained in any Court of Civil Judicature. *Held* that the phrase lands "held for service" means lands declared by Government under Sec. 32 (d) of the Act to be so held, though the plaintiff may deny that the lands in respect of which he sues are service lands.

The laying down of general rules by Government as to the resumption of service lands, under Art. 3, Cl. 3, of Sec. II. of the Act, is not a condition precedent to their protection from suits and actions in respect of such lands.

The Governor of Bombay in Council has power to pass Acts limiting or regulating the jurisdiction of the Courts in the Mofussil established by the local Legislature, and such Acts are not void because their indirect effect may be to increase or diminish the occasions for the exercise of the appellate jurisdiction of the High Court.

The policy of Government as shown in its course of legislation of recent years with reference to judicial institutions, as compared with its policy at the time when the Elphinstone Code was passed, reviewed.

THIS was a regular appeal from the decision of W. H. Newnham, Acting District Judge of Súrat, in Original Suit No. 22 of 1870.

The plaintiff, Premshankar, sued to recover Rs. 7-15-6, which sum, he alleged, had been wrongfully levied by the Collector of Súrat on a certain piece of land in the occupation of the plaintiff.

The defendant answered that the land had been held for service, which was no longer required (that of keeping a school), and, therefore, that assessment had been levied upon the land, and that, under Bombay Act VII. of 1863, it rested with the Government, and not with the Civil Courts, to decide whether the land was service land or not.

1871. The Acting District Judge, who tried the original suit, being of opinion that, under Bombay Act VII of 1863, he had no jurisdiction in the matter, dismissed the claim.

GOVERNMENT OF BOMBAY. The appeal was argued before WESTROPP, C. J., and WEST J., on the 6th of September 1871.

*Anstey* (with him *Nanabhái Haridas* and *Chunilál Mavilál*), for the appellant :—The judgment of the learned Judge against which we appeal rests on a supposed relation between Sec. 32 (d) of Bombay Act VII of 1863 and Sec. II., Cl. 3, Art. 3, of the same Act. He has, I contend, mistaken the intent of the Act, which was not intended to take away the jurisdiction of the Civil Courts, but to make the determination of Government, with respect to lands actually held for service, the basis upon which the judgment of the Civil Court should be rested. Here the lands in respect of which we sue are not service lands.

If the view of the Judge as to the construction of this Act be a correct one, then I say that a local Legislature had no power thus to limit the action of the Civil Courts, and that the Act is inoperative: *Dr. Bonham's Case* (a), *Podger's Case* (b), *Lord Cromwell's Case* (c). [WESTROPP, C. J., referred to the remarks in 1 Kent's Comm., 10th ed., pp. 502, 503, upon *Dr. Bonham's Case*.]

The Bombay local Legislature could not pass this law, as it affects the jurisdiction of the High Court on its Appellate Side, which can withdraw suits from the Mofussil Court, and to which in most cases there is a right of appeal. In *Reg. v. Reay* (d) it was held that the creation of a concurrent criminal jurisdiction over European subjects affected the jurisdiction of the High Court, and that the Act, so far as it had that effect, was void. The Act (VII. of 1863) does not give the Government absolute power to deal with service *ináms*: *Government of Bombay v. Dámodhar Parmánandás* (e), where it was held that the Government has no power to resume

(a) 8 Rep. 107 a.      (b) 9 Rep. 106 b.      (c) 4 Rep. 12 b.

(d) 7 Bom. H. C. Rep., Cr. Ca. 77.

(e) 5 Bom. H. C. Rep., A.C.J. 202.

*majmudári watans* by dispensing with the performance of services in respect of them if the holders are willing to perform such services.

The Government have laid down no general rules under Sec. II., Cl. 3, Art. 3, of the Act, and Sec. 32 (d) of the Act does not debar the Judge from deciding such suits as the present until such rules are laid down. The framing of such rules is a condition precedent to the exemption of Government from civil action in respect of service lands.

Down to 28 & 29 Vict., c. 63, no Colonial Legislature had authority to pass laws interfering with or repugnant to the Statute or Common Law of England. The delegation of power to legislate, without an express enactment empowering interference with Acts of Parliament, does not extend to anything that would derogate from an Act of Parliament.

34 & 35 Vict., c. 34, s. 3, enables the local Legislature to repeal or to amend its Acts confirmed by the Government of India.

He cited 33 & 34 Vict., c. 3; 32 & 33 Vict., c. 98; 3 & 4 Wm. IV., c. 85, ss. 81-86; 24 & 25 Vict., c. 104, ss. 11, 13, and 31; Forsyth's C. L., pp. 32, 33.

*Mayhew* (with him *Dhirajlál Mathurádás*, Government Pleader), for the Collector :—There would be no sense in the power given in Sec. 32 (d) of the Summary Settlement Act unless it be exclusive. Sec. II., cl. 4, completely protects the Government. The local Council had full power to legislate for Gujarát, its people and courts, by 24 & 25 Vict., c. 67, s. 42. The High Court Act had not then been passed.

*Anstey*, in reply :—The plaintiff denies that he is the holder of any service land. Cl. 4, Sec. II., applies to such a holder only.

*Cur. adv. vult.*

November 8th. The judgment of the court was delivered by

WEST, J.:—The judgment of the Court below in this case rests, as correctly stated by Mr. Anstey, on the relation

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between Sec. 32 (d) and Sec. 11., Cl. 3, Art. 3, of Bombay Act VII. of 1863. By the former it is provided that "Government shall be competent to determine any question that may arise in giving effect to this Act as to whether or not any lands are lands held for service." The latter says that "Lands held for service shall be resumable or controllable under such general rules as Government may think proper from time to time to lay down." The form of the action here implies that Government has in fact determined the lands in suit to be service lands, and has, on that ground, resumed them, that is, made them liable to assessment in the ordinary way. Cl. 4 of Sec. 11. says that "no suit or action between Government and the holders of any lands held for service, in regard to the tenure of such lands, shall be entertained in any Court of Civil Judicature," and on this the District Judge has relied in declining to exercise jurisdiction. It has been urged on us that the Act has not in fact any such effect as this, but that it merely binds the Judge to adopt the ruling of Government as to the nature of the holding as the ground of his decision. This would not, perhaps, practically lead to results very different from those which flow from the view taken by the District Judge. The resumption, under a power expressly given, of lands authoritatively declared to be service lands, and therefore resumable at the will of the Government, could not form a valid ground of action. But then, if we have rightly apprehended Mr. Anstey's learned argument, it is contended that the enactment of such provisions as these, and the exemption of Government from suits on account of service lands resumed by it, are beyond the competence of the local Legislature. In support of these views he has cited a great number of authorities, through which it will not, we think, be necessary to follow him in detail. It is enough, in our opinion, to say that they afford no effective support to the conclusion that the local Legislature is debarred, by the mere circumstance of its dependence, from making laws for the regulation of the Mofussil Courts subsisting, not by any charter from the Crown, but by the creation and protection of the local Government itself.

A dependent Government can make laws for all purposes, consistent with the laws of the dominant country applicable to the dependency. It was solely in the exercise of such a power as this that the Zillá Courts were constituted by the Regulations of the Elphinstone Code—courts which have been recognised and substantially continued by Act XIV. of 1869. That Act is one passed by the Governor General in Council, but Bombay Act VII. of 1863 was passed while the District Courts subsisted under their original constitution alone. The powers of the Governor in Council, at present, for legislative purposes, are defined by Stat. 24 & 25 Vict., c. 67, s. 42. He may “make laws and regulations for the peace and good government of (this) Presidency, and for that purpose repeal and amend any laws and regulations made prior to the coming into operation of this Act by any authority in India so far as they affect (this) Presidency.” In the next section there follows a specification of certain subjects on which the Governor in Council is not to legislate, but amongst these no mention occurs of the jurisdiction of the Mofussil Courts. It cannot be said that the regulation of the Civil Courts and their powers is not an element of the “peace and good government of this Presidency;” and when the local Government found it consistent with its policy to limit the powers of the Civil Courts in the case of service lands, it was quite within its competence to make such modifications of the laws previously in force as were necessary for that purpose. It was pressed on us, indeed, that the High Court could withdraw to itself civil suits instituted in the Mofussil Courts if it saw fit; that an appeal to it lies in all cases tried originally by a District Judge; and that thus the Act of the Bombay Legislature (putting the District Judge’s interpretation on its clauses) goes directly to deprive the High Court of a jurisdiction conferred on it by the Statute and Letters Patent constituting the court: and in one sense there is some force in this argument. The Act, no doubt, removes the possibility of some contingencies arising, on the happening of which this court might exercise its powers on the Original Side or in hearing the appeal. But we do not think that this operation of the Act can reasonably be

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held to "affect the provisions" of the Statute constituting the High Court in the sense intended by the Legislature. Every ordinary law passed by the Governor in Council, if it is to be effectual, must be made so by some sanction. That sanction must be enforced by the courts subject to the appellate and superintending authority of the High Court. Thus the passing of such a law necessarily adds to the jurisdiction of this court in the sense of the number of subjects to which its judicial authority may possibly be extended. Conversely, every repealing Act diminishes its jurisdiction in a similar sense. Are the Acts therefore void? Such a conclusion, completely paralysing the local Legislature, would obviously defeat, not promote, the purposes of the Imperial Parliament. The provisions of the statute must plainly receive a more liberal construction—one liberal enough to admit of the local Legislature extending or restricting the powers of the courts, its own creatures, even though the possible occasions for the exercise of this court's jurisdiction may thus indirectly be increased or diminished in number.



What then is the proper—that is, the intended—effect of the provision in cl. 4 of Sec. 11. which we have cited? *Prima facie* it is unquestionably a direct and complete bar to the exercise of jurisdiction by the Civil Courts in such a case as the present. It was indeed, in the last stage of the argument before us, contended that the clause applies only to holders of service lands; that the plaintiff here denies that his land is subject to provide for service at all; and that, therefore, the clause can have no application to him. But the phrase lands "held for service" plainly means, not lands so described in the plaint, but declared to be so by Government under the powers conferred by Sec. 32 (d). The plaintiff is the holder of such land; and the clause says that his suit shall not be entertained. The literal sense, however, of an apparently peremptory direction such as this, is not unfrequently modified by its place in the law, by the context, by the scope and purpose of the law itself, and by its relation to the general course of legislation. We, therefore, took time to consider how far, if at all, on duly weighing these circumstances in the

present case, we might be justified in moderating the literal rigour of a somewhat arbitrary rule. Art. 3 of Cl. 3 says that service lands shall be “resumable under ‘general rules,’” and, provision being thus made for some degree of regularity in the determination of claims, we should have been inclined, had the words we have just quoted stood unqualified in the clause, to read the two provisions of it and of Cl. 4 together, and to hold that Government was in these cases protected against a civil action only when it had in fact laid down some general rules and conformed to them. But the general rules “are such as Government may think proper from time to time to lay down.” Words so loose as these cannot, we think, be fairly construed as imperative; they seem meant to leave everything to the discretion of Government, or at most to be merely directory. But at any rate they are not so clearly imperative as to deprive the absolutely imperative words in Cl. 4 of their natural effect. When we find it prescribed without qualification that “no suit or action” shall be entertained as to the tenure of service lands, we cannot think that jurisdiction is restored by a mere direction in another clause, that Government is to follow general rules such as it “may think proper from time to time to lay down.”

The general tenour of the Act is opposed to any construction by which the power of final disposal, in the cases for which it is intended to provide, reserved to the Governor in Council, should be made subject to revision by the Civil Courts. A trace of the older system may be found in the appeal, given by Sec. 19, to the District Court against a decision of a Collector on a case submitted to regular investigation. But even this is to be taken with Sec. 14, which throws the proof of title in such cases exclusively on the assertor of his right, while Sec. 28 provides carefully against any disturbance or investigation by the Civil Courts of summary settlement once approved by the Government. The course of legislation on similar subjects in recent times shows a greater and greater contraction of the spirit of liberality, and of confidence in its judicial institutions, which

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animated the Government in framing the Elphinstone Code of 1827. The merits or demerits of this policy we do not intend to discuss, but we must note the fact as throwing light on the probable intentions of the Legislature in passing Bombay Act VII. of 1863. Thus viewing the subject, we do not think it improbable that the Government intended to withdraw the whole class of cases to which our attention has now been directed from the cognisance of the tribunals to which it was content to leave the adjudication of its subjects' mutual rights and duties where its own interests were not concerned. Neither the general purpose of the Act, therefore, nor the circumstances under which it was passed, seem to enable us to give to the words we have had to construe any other than their literal interpretation.

We must, therefore, confirm the decree of the District Judge, but, looking to all the circumstances, without costs.

*Decree confirmed.*

Dec. 8.

*Regular Appeal No. 36 of 1871.*

BINDA'CHARI ..... *Appellant.*  
I. DRACUP, Magistrate F. P., Dharwar... *Respondent.*

*Preliminary Proceedings—Vakíl's Right to appear for Complainant—Crim. Proc. Code, Sec. 180.*

At an inquiry held by a Magistrate under Sec. 180 of the Criminal Procedure Code for the purpose of ascertaining the truth or falsehood of a complaint, the complainant has no right to be represented by a *vakíl*, who, therefore, cannot sue the Magistrate for damages for not allowing him to appear for the complainant upon such an inquiry.

THIS was an appeal from the decision of Baron De H. Larpent, Acting Judge of the District of Dhárwár, in Original Suit No. 15 of 1869.

The plaintiff, who was a *vakíl* in the Dhárwár District, sued to recover damages incurred by him in consequence of the defendant having, in his capacity of a Full Power Magistrate in the same district, refused to accept a *vakálatnáma* presented in the defendant's court by the plaintiff on behalf of his client, one Samnúji, who had charged one Dhuláji and another

person with the offence of criminal breach of trust before the said defendant.

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The defendant stated that the plaintiff had no right to appear for the complainant in a preliminary inquiry; that it was within his discretion to allow the plaintiff to appear, and that he *bonâ fide* exercised his discretion in not allowing him to appear.

The District Judge was of opinion that the complainant, Samnáji, had no right to appear by the plaintiff. He gave the following reasons for coming to that conclusion:—

“A Magistrate, it appears to me, is not bound to recognise the appearance of a complainant in a criminal case by a *vakíl*. A Magistrate, under the Procedure Code, is vested with the double functions of prosecutor and judge. The complainant is not a prosecutor, for Government undertakes this duty and provides funds for meeting all the costs. When a case is committed to the sessions, it is the Magistrate who conducts the prosecution through the Government Pleader or other officer appointed by Government (Sec. 23), and no complainant could claim as a matter of right to appear in the Sessions Court through a *vakíl*.

“The complainant's personal appearance is exacted by the Code. He must appear to make his complaint (Secs. 65, 66), and he is bound to appear personally on the hearing of the case (Sec. 259). There is also a special rule (Sec. 432) regarding the right of an accused to be defended by counsel, but no analogous provision regarding complainants. Admitting, however, that a complainant must appear personally, has he a right to be assisted by counsel? There is no provision of law which gives him this right, although it is doubtless the practice in all the courts, so that it appears to me entirely at the discretion of the court to refuse or allow a complainant such assistance.”

The District Judge was further of opinion that, though the defendant did not exercise a proper discretion in refusing to allow the plaintiff to appear, it was not proved that he had acted except with proper care, and that he was protected by Act XVIII. of 1850. He, therefore, decreed for the defendant.

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The appeal was heard by LLOYD and KEMBALL, JJ.

*Bahiravnáth Mangesh*, for the appellant:—The Judge's view is erroneous. Neither the Statute nor the Common Law ever denied the complainant's right to appear by counsel. The Judge says the *vakíl* had no right to appear in the inquiry, under Sec. 180 of the Code of Criminal Procedure. This section speaks of the Magistrate *directing* an inquiry. Here the inquiry was held by the Magistrate himself, and was, therefore, not under Sec. 180.

The inquiry by the Magistrate was a judicial proceeding, for if the complainant had made a false statement in his examination he would have been liable to the charge of giving false evidence. In a proceeding of such a serious character, the complainant should be allowed the assistance of counsel.

According to the theory of Criminal Law, the Sovereign is the prosecutor in every criminal case, and has the right to examine the informant. Such a right is expressly recognised by this court in a circular \* at page 58 of the Circular Book.

*Dhirajlál Mathurádás*, Government Pleader, for the respondent:—The plaint discloses no cause of action.

PER CURIAM:—We think that the rejection of the *vakálat-námá* at the preliminary inquiry, when the Magistrate was bound by law merely to inquire in the “mode he shall judge most proper” for the purpose of ascertaining the truth or falsehood of the complaint,” was a matter in which he was at liberty to use his discretion; that being so, it is clear that the Magistrate was exempted from civil liability for the damage alleged to have resulted. But assuming that the act of the Magistrate was without the limits of his jurisdiction, we observe that there is no allegation in the plaint that the Magistrate did not in good faith believe himself to have jurisdiction to make the order complained of.

*Decree confirmed.*

\* “As there appears to be a doubt in the minds of some of the Session Judges as to the extent of the right of the Crown to be heard by counsel or by pleader in criminal cases, all courts are informed that the Queen is entitled, as a matter of right, to be heard by counsel or pleader in support of each prosecution, whether it be in an appellate or an original court of criminal jurisdiction.”

The Queen always to be heard in criminal cases.



*Regular Appeal No. 59 of 1870.*1871.  
Dec. 11.

KA'KA'JI bin RA'NOJI *et al.* ..... *Appellants.*  
 BA'PUJI bin MA'DHAVRA'V ..... *Respondent.*

*Cir. Proc. Code, Sec. 7—Suits instituted before Code came into operation—Mesne Profits—Costs.*

In applying the provisions of Sec. 7 of the Code of Civil Procedure, the first thing to be considered is whether the cause of action in the second suit is the same as the cause of action in the first. If the cause of action be the same, the second suit is barred in respect of any portion of the claim omitted from the first suit; but not otherwise. Accordingly, where the plaintiff, as a member of an undivided Hindú family, sued for a share of a particular portion of the family property, leaving the rest undivided, and his suit was rejected, as it had not been brought for his whole share, it was held that this suit was no bar to a second suit to have the whole property divided, as the causes of action in the two suits were entirely distinct.

In a suit for partition of hereditary property, it is not necessary for the plaintiff to trace back his genealogy to the original grantee, and to prove that no other descendant of that grantee except himself and the defendants are in existence. It is sufficient for him to show that he and they are the only representatives of the person who last held the property. If others claim a share, it is for them to show that they have any rights which operate to restrict the plaintiff's *prima facie* right to treat such property as the exclusive property of himself and the defendants.

There is no objection to the award of mesne profits or interest during the whole period for which a suit is pending, however long that period may be.

THIS was an appeal from the decree of Kṛishṇáji Vishṇu Limáye, First Class Subordinate Judge of Ahmednagar, in Suit No. 1897 of 1861.

The plaintiff, Bápuji, in 1856 brought a suit against the defendant Kákáji and three others, to recover his third-share from a half of the *deshmukhi* allowances in the *prajānā* of Sinnar, and reserved to himself the right of suing for a share of similar allowances in other places. This suit was ultimately rejected by the late Śadr Court, on the ground that the plaintiff was bound to sue for his whole share. He, accordingly, brought the present suit in September 1861 for his whole share in the entire ancestral property in the possession of himself and his four cousins.



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The defendants pleaded that the claim was barred; that the *watan* was not divisible, according to the custom of the family; and that there were thirteen other persons interested in the *watan* who had not been joined in the suit.

These latter persons were subsequently made defendants.

The First Class Subordinate Judge found the suit not to be barred, and awarded the share claimed, with mesne profits from the date of suit to the date of execution.

The appeal was heard by MELVILL and KEMBALL, JJ., on the 4th of December 1871.

*Shántáram Náráyan*, for the appellants:—The suit is barred by Sec. 7 of Act VIII. of 1859. This Act was passed in May 1859, although it did not come into operation till January 1862. The suit was filed in September 1861; and Sec. 7 of the Act applies to it (a). In the first suit the plaintiff sued only for his share in the Sinnar district allowances, and omitted to sue for, or relinquished, his share in the other districts. Whether he did so from an accidental error or a voluntary omission does not matter, as has been held by the Privy Council in the above case. Besides the plaintiff and the defendants, there are other sharers in the allowances; and the plaintiff was bound to trace back his genealogy to the original grantee, and show who were the different parties entitled, and what was the share of each. The defendants are members of the elder branch of the family, and as such entitled, according to a custom in their family, to the enjoyment of the whole *watan*, the other members having no other claim than that of maintenance. The court below has awarded mesne profits for a period longer than six years, which is opposed to the practice of this court. The plaintiff has included in his plaint certain villages which are in his own possession, and has thereby increased the costs improperly against the defendants.

*Dhirajlál Mathurádás*, Government Pleader, for the respondent:—The Code of Civil Procedure, though it was

(a) *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*, 11 Moo. Ind. App. 551; 8 Calc. W. Rep., P. C. 3.

passed in May 1859, came into operation in January 1862, more than three months after the institution of this suit, and is, therefore, not applicable. Even if it be applied, Sec. 7 of the Code is no bar to its maintenance. The causes of action in the two suits are distinct. The plaintiff has shown that the *watan* of which a share is claimed by him was last held by Mádhavráv, the common ancestor of himself and the persons whom he originally sued. As to the family custom set up, it has been held by the High Court that it cannot be recognised (*b*). With regard to the mesne profits, there is no law restricting the award to a period of six years after the institution of a suit. Once an action is filed, the parties are in the hands of the court, and they ought not to suffer for any delay caused in the progress of a suit. The plaintiff has properly included in his plaint the villages in his own possession, for he is suing for a general partition of the whole family property.

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*Cur. adv. vult.*

December 11. MELVILL, J.:—This is a suit for partition of the land and emoluments attached to a *deshmukhi watan*.

A preliminary objection has been taken that the claim is in part, if not entirely, barred by Sec. 7 of Act VIII. of 1859, the plaintiff having in a former action sued for a portion of the lands which he now claims.

The former suit was brought in 1856, and was decided by the Şadr Diváni Adálat in 1857. The plaint has not been produced before us, but from the judgment it appears that the plaintiff sued the present appellants to recover from them the third-share of the *deshmukhi haks* in the *praganá* of Sinnar, at the same time reserving to himself the right to sue at a future time for a share of the same allowances in other *praganás*. The final judgment of the Şadr Adálat was in these terms:—"The Court, concurring in opinion with the Judge who admitted this special appeal, that the Zillá Judge ought to have read exhibit No. 14 in conjunction with exhibit No. 39, and that Bápu is not thereby precluded

(*b*) *Basvantráv v. Mantáppá*, 1 Bom. II. C. Rep., Appx. XLII.

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 from suing for his share of the *watan*, find, however, that he has only sued for a portion of his share, and not for his whole share, which it is requisite for him to do, as no division has yet taken place in the family. The Judge's decree, therefore, so far as it throws out Bápu's claim as being improperly brought, is affirmed."

From the judgment it is clear that the Šadr Adálat declined to enter into the merits of the claim. They rejected the claim on the ground that an action in that form was not maintainable, and they at the same time pointed out to the plaintiff the proper course for him to adopt.

He has now adopted this course, and it would certainly be strange, and but little creditable to our system of procedure, if we were obliged to hold that the present action is barred by the former suit, in which nothing was decided except that the present action was the remedy to which the plaintiff should resort.

There has been much argument at the bar on the question whether Sec. 7 of Act VIII. of 1859 can affect this case, seeing that the former suit was brought and decided before the Code of Civil Procedure was enacted. The Judicial Committee of the Privy Council seem\* to have held the section applicable under such circumstances, and we are informed that a Division Bench of this court followed that precedent in S. A. No. 314 of 1866 (c), decided on the 26th August 1867. Were it necessary for us to decide this question, the great respect which we feel for every decision of the Privy Council would induce us (if we were satisfied that it was their deliberate intention to give retrospective effect to a provision of a statute affecting not only procedure, but rights) to find the best reasons we could for a decision which we should feel bound to follow, but which, standing, as it now does, unexplained, appears to be not easily reconcilable with the established rules for the construction of

\* *Moonshee Buzloor Rukeem v. Shumsoonissa Begum*, 11 Moo. Ind. App. 551 ; 8 Calc. W. Rep. P. C. 3.

(c) *Malhárrár v. Krishnúrác*.

statutes. But we are happy to be spared the necessity of so doing, as we are of opinion that, even if it be admitted that Sec. 7 is applicable, it does not in any way bar the present suit.

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That section says that "every suit shall include the whole of the claim arising out of the cause of action. \* \*

\* \* If a plaintiff relinquish, or omit to sue for, any portion of his claim, a suit for the portion so relinquished shall not afterwards be entertained."

Now, evidently the first thing to be considered, in applying this section, is whether the cause of action in the second suit is the same as in the first. If so, but not otherwise, the second suit is barred in respect of any portion of the claim which was omitted from the first suit.

In the present case it seems quite clear to us that the plaintiff's claim does not arise out of the cause of action which was put forward in the former suit.

In the former suit the plaintiff's supposed cause of action was a right, as a member of an undivided family, to demand a share of a particular portion of the family property, and to leave the rest undivided. In the present suit, his cause of action is a right to have the whole family property (whether held by himself or others) brought together and divided. So far from these two being the same cause of action, they present all the difference which is expressed by saying that the one is a cause of action, and the other is no cause of action. If the former suit had been for a general partition, and the plaintiff had omitted to include in his claim the whole of the family property, there would have been some ground for the appellant's objection.

As was suggested by Mr. Justice Kemball in the course of the argument, the case is analogous to that of one of several partners who sues another partner for his share of the profits arising out of one particular partnership transaction, and is told that his proper course is to sue for a dissolution and an account. Could it be said that a suit for dissolution, and a general distribution of assets and liabilities

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among all the partners, was founded on the same cause of action as a suit of which the object was a continuance of the partnership, and the settlement of a single item in dispute between two of the partners?

Being of opinion that the cognisance of the suit is not barred by Sec. 7, we have further come to the conclusion that the plaintiff is entitled to succeed on the merits.

The suit was originally brought against the four appellants, who, together with the plaintiff, are the only descendants of Mádhavráv, by whom it is admitted that the whole *watan* was held. The defence of the appellants was that there were a number of other sharers, remote relatives, and representatives of two other branches of the family; and it is contended that the plaintiff was bound to trace back his genealogy to the original grantee of the *watan*, and to prove that no other descendants of that grantee, except himself and the appellants, are in existence. We do not think that he is under any such obligation. *Primá facie* it was sufficient for him to show that the whole *watan* was held by Mádhavráv, and that he and the appellants are the only representatives of Mádhavráv. Twelve other persons named by the appellants as co-sharers have been joined as defendants, and it is for them to show that they have any rights which operate to restrict the plaintiff's *primá facie* right to treat as the exclusive property of himself and the appellants property which has for a great number of years been managed exclusively by them and their common ancestor Mádhavráv.

The case set up by the appellants is that, in accordance with a family custom, they, as representatives of the eldest branch of the family, are entitled to the exclusive management of the *watan*; that the plaintiff and the distant relatives who have been joined as defendants are entitled to maintenance, and nothing more; and that the plaintiff, having had three villages assigned to him for his maintenance, has no claim to anything more. There is no proof whatever of the existence of any such family custom. Of the twelve persons named by the appellants as co-sharers, ten only have appeared. Of these, three (witnesses Nos. 292, 294, and 295) know

nothing about any maintenance having been paid out of the *watan* to their branch of the family. The rest declare that payments have been made to them for maintenance, and they are to a certain extent corroborated by the plaintiff's witness No. 223. Receipts for these alleged payments are also produced by the appellants (exhibits 94 to 141). We consider that this evidence is not sufficient to establish any right of these defendants to share in the *watan*. The receipts have all been given since the plaintiff's claim to a third share was first made, and the wording of the receipts clearly shows that at the time when the receipts were written, it was in contemplation to use them for the purpose of resisting the plaintiff's claim. They are, therefore, of little or no value. The statements of the defendants as to the payments made to them are very loose and vague. They do not say that they received any fixed annual sum for maintenance, but that when they wanted ten or twenty rupees for their expenses they received it from the first appellant or his father. Considering the extreme care which the sharers in a *watan* ordinarily take to define and to exact their full rights, we can hardly regard such a statement as credible. Such a primitive mode of dividing the proceeds of the *watan* might be intelligible if the defendants had been living together as a united family, but in point of fact they have been scattered about in different parts of the country for years, if not for generations. Their names are not entered in the Government books as sharers in the *watan*, and they have never had any voice in the management of the *watan*. The appellants now put forward these defendants as sharers in the *watan*; but it is shown that during the interval between the suit of 1856 and the present suit the appellants negotiated with the plaintiff on the basis that they and the plaintiff were the sole proprietors of the *watan*. On the whole, we do not think there is any satisfactory proof either that there are any sharers in the *watan* except the plaintiff and the four appellants, or that any payments have been made by the appellants for which they are entitled to credit in the calculation of mesne profits.

The defendants who were subsequently joined in the suit did not appeal against the decision of the Subordinate Judge ;

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but at the last moment, when the Pleader for the appellant had almost concluded his reply, an application was made on their behalf that they might be joined as appellants. This was, of course, refused; but they have not, in fact, been at all prejudiced by the refusal. They have had the full benefit of Mr. Shántarám's able argument, the whole object of which was to establish the rights of those defendants whom he did not nominally represent, and thereby to procure the rejection of the claim against those for whom he appeared.

We think that the plaintiff is entitled to the share claimed by him, and to mesne profits from the date of suit till the date of execution. Mr. Shántarám has contended that mesne profits cannot under any circumstances be awarded for a longer period than six years; but we know of no provision of any law of limitation which prevents a court from awarding mesne profits or interest during the whole period for which a suit is pending, however long that period may be. We should be very sorry if any penalty of the kind were imposed upon the victims of the dilatory action of our courts. Another objection which Mr. Shántarám has taken in the matter of costs appears to us equally unsustainable. He contends that, in his valuation of the suit, the plaintiff ought not to have included the value of the three villages in his possession, since he was not suing for a share of those villages; but in fact he was suing for his share of the whole family property, and it was both right and necessary that he should bring into account, as the subject-matter of this suit, the whole of the property, whether held by himself or the defendants.

We affirm the Subordinate Judge's decree, and award mesne profits (to be determined at the execution of the decree) from the date of the institution of the suit till the date of execution, with costs throughout on the appellants.

*Decree accordingly.*



*S.L. 2 Com: 1.255.*  
*S.L. 2 Com: 1.274.*

Special Appeal No. 612 of 1871.

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 Nov. 9.

DULLABH SHIVLA'L, heir of Ghelábhái

Shivlál, deceased .....Appellant.

T. C. HOPE, President of the Súrat Muni-

cipality, BHAGVA'NDA'S LA'LBHA'I, *et al.* Respondents.

*Acts, Construction of—Taxes, Acts imposing—Ambiguous Words—  
 Súrat Bye-laws—Copper.*

In order to impose a tax, due, rate, or toll upon a subject, the framers of the Act or Bye-law under which such tax, &c. is imposed must use clear and unambiguous words to effect their purpose. When the words used are ambiguous, the intendment of the courts will be in favour of the subject upon whom the tax is sought to be imposed.

Thus where the framers of the Súrat Bye-laws imposed a tax of one rupee per Súrat *man* upon "copper" imported into Súrat for consumption, it was held that copper wrought up into pots did not fall within the words of the bye-law.

*Semble* that when a tax is imposed upon goods imported into a town for consumption, and such goods, after having been subjected to the tax upon being imported into the town, are afterwards taken out for sale into the neighbouring villages and brought back unsold, such goods are not liable to be subjected to tax a second time.

THIS was a special appeal from the decision of W. H. Newnham, District Judge of Súrat, reversing the decree of George Ayerst, Acting Assistant Judge at that station.

The special appeal was heard by WESTROPP, C. J., and WEST, J.

*Chunilál Mániklál* for the special appellant.

*Dhirajlál Mathurádás*, Government Pleader, for the Collector, and *Nánábhái Haridás* for the other respondents.

The facts sufficiently appear from the following judgment of the court, delivered by

WESTROPP, C.J. :—One of the Rules or Bye-Laws (Sec. 26, Appx. B) of the Municipality of Súrat, framed under Act XXVI. of 1850, entitles the municipality to levy a tax upon "copper" at one rupee per Súrat *man*, for municipal purposes. The municipality has levied from the appellant (plaintiff) Rs. 27-6-7 upon copper pots, the copper of which had originally been imported into Súrat from Bombay in the form of



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copper plates, on which the municipal tax for copper was then paid. The plates afterwards were manufactured in Súrat into copper pots, which the appellant took to a neighbouring village for sale, but, not having sold them, brought them back to Súrat, and the abovementioned sum of Rs. 27-6-7 was then levied from him upon the copper pots. He brought his suit against the managing committee of the municipality to recover that amount, as illegally levied from him. The Assistant Judge, Mr. Ayerst, decreed in his favour. The District Judge, Mr. Newnham, reversed that decree. Against that reversal the plaintiff has appealed.

The three grounds of objection mentioned in the memorandum of appeal may be resolved into two, namely: (1) Are copper pots on their original importation into the city of Súrat liable to the municipal toll? (2) If so, and if taken out of the city for sale and brought back unsold, are they, on such re-entry into that city, liable to the municipal toll, notwithstanding that such toll had been paid, upon the copper of which they are made, on its being originally imported into the city in the form of copper plates?

Rule 26 of the Súrat Municipal Rules is this :—

“ Taxes at the rates specified in Appendix B, as sanctioned by Government, shall be levied on the articles therein mentioned.”

The Appendix therein referred to is, so far as it is material, as follows :—

#### “ APPENDIX B.

##### *Description of Municipal Taxes to be levied in the Town of Surat.*

A tax shall be levied on the following articles, according to the rates specified against each, when imported into the Town of Surat for consumption :—

Names of Articles.—*Imports.*

Rate of Tax.

|                                                             |                          |
|-------------------------------------------------------------|--------------------------|
| Ghee.....                                                   | 1 Rupee per Surat Maund. |
| Butter .....                                                | 8 Annas „ „              |
| Sugar, coarse and refined .....                             | 8 Annas „ „              |
| Cocoanuts .....                                             | 1 Rupee per 1,000.       |
| Silk (here follow seven kinds<br>of Silk at various rates). |                          |

## Cotton Yarn—

|                         |                           |
|-------------------------|---------------------------|
| Yarn, Europe .....      | 1 Rupee per Bengal Maund. |
| "    "    Dyed .....    | 1 R. 4 annas   "    "     |
| Bundles of Thread ..... | 1 R. 10 annas   "    "    |
| Copper.....             | 1 Rupee per Surat Maund.  |
| Ivory .....             | 3 Annas per Bengal Seer." |
| &c.   &c.   &c.         |                           |

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The words "for consumption" when applied to copper may be interpreted to mean for the purpose of being manufactured, and seem to be inconsistent with the supposition that copper, already manufactured into vessels or other articles, was intended. Possibly old copper vessels unfit for use, and imported into the city in such a condition and quantity as to lead to the conclusion that they were so imported merely for the purpose of being re-manufactured, might be considered within the meaning of copper imported for consumption, but this could not reasonably be presumed of copper vessels which are new, or in a serviceable condition, and fit for sale and use. But, even without the aid of the words "for consumption," the word "copper" seems to us *primâ facie* to mean copper not worked up into vessels or other articles. When the Legislature desires to include what is manufactured as well as what is unmanufactured, it usually does so in express terms—*e. g.*, Act XVIII. of 1854, Sec. 10; Stat. 1 Wm. IV., c. 68, s. 1. Putting the case in the most unfavourable point of view to the plaintiff, it must be admitted that it is at the least doubtful that copper manufactured into vessels or other goods was intended to be included. For the intention we must look to the language of the Rules and Appendix B only. The *ratio decidendi* suggested by the District Judge when he said: "But it must be borne in mind that this is not a case of laws enacted by the Legislature and enforced by executive officers, but of rules framed by the same body who execute them, and there is a certain presumption that they best know what they meant when they framed the rules," is completely inadmissible. The municipality is not to be regarded as the judge of its own cause: *Reg. v. Kálidás Keval (a)*; *Reg. v. Yenku Bápuji (b)*. And even if the municipality, when framing its

(a) 5 Bom. H. C. Rep., Cr. Ca. 10. (b) 8 Bom. H. C. Rep., Cr. Ca. 39.

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bye-laws, supposed that the term "copper" included wrought as well as unwrought copper, it does not follow that Government, in sanctioning the rules, meant to adopt any such large construction of that word, or that the subsequent practice of the municipality, during the few years which have elapsed since the making of the rules, can be permitted to influence us in our construction of them, or in any wise to depart from the ordinary canons of interpretation applicable to legislative enactments or bye-laws relating to rates, taxes, or tolls.

It is a legal axiom that "no pecuniary burden can be imposed upon the subject, by whatever name it may be called, whether tax, due, rate, or toll, except upon clear and distinct legal authority, established in proof by those who seek to impose the burthen," [see the remarks of Wilde, C. J., in *Gosling v. Veley* (c) in the Exchequer Chamber, and afterwards as Lord Truro in the House of Lords (d), and of Martin, B., in the same case (e); and see *Holloway v. Smith* (f)]. In *Denn v. Diamond* (g) Bayley, J., said: "It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language." That was a case in which a father conveyed lands to his son, as well in consideration of natural love and affection as also in consideration of the provision, which the son had that day made (by his bond), of £1,500 in augmentation of the fortunes of his sisters. which transaction was held not to be a "sale" of the land within the meaning of the Stamp Act 48 Geo. III., c. 149. and, therefore, that the conveyance was not liable to an *ad valorem* stamp duty. Holroyd, J., said: "It is true that the son, paying money for the estate, may in some sort be a purchaser, but that does not make the father a seller; and to bring the case within the statute, I think there must be a sale as to both." In *Phillips v. Morrison* (h) the Court of Exchequer said: "The party who seeks to bring an instru-

(c) 12 Q. B. 407. (d) 4 Ho. Lo. 781. (e) *Ibid.* 727.

(f) 2 Stra. 1171. (g) 4 B. & C. 245.

(h) 13 L. J., N. S., Exch. 212, 213; and see *Doe v. Amos*, 2 M. & R. 180. and per Heath, J., in 3 Taunton, 220.

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ment within the Stamp Act must show clearly that it falls within it; he must, so to speak, hit the bird in the very eye. We can make no intendments in favour of the liability." Lord Brougham in the *Stockton and Darlington Railway Company v. Barrett* (i) said: "It must be observed that in *dubio* you are always to lean against the construction which imposes a burden on the subject. The meaning of the Legislature to tax him must be clear." And referring to *Gildart v. Gladstone* (j) he said: "The Court there said in effect, 'here is a company which gets an Act of Parliament to tax the subject; it is incumbent upon that company to do two things—to take care that the Act of Parliament is made clear and undoubtful, especially upon those clauses by which the company seeks to impose a burden upon the public; and if companies do not choose to take the trouble to do that, let them abide by the consequences: they will not be able to levy the duty.'" That remark is *à fortiori* applicable to a municipality when enacting its bye-laws, as it has, under certain restrictions, the legislative power in its own hands.

Lefroy, C. J. (k), after referring to Lord Coke's remark that "the construction of a statute is best made *ex visceribus actus* (l), said: "Besides this general rule of construction, there are two other principles which may be considered as bearing upon this case, namely, 1st, if by a statute it is intended to impose a tax upon the subject, its construction must be clear beyond all reasonable doubt: and 2ndly, the Common Law rights of the subject in respect to the enjoyment of his property are not to be trenched upon by a statute, unless the intention is shown by clear words or necessary implication." The same learned Judge and his colleagues, acting upon those principles and on the rule *noscitur a sociis*, held in *Shaw v. Ruddin* (m) that the word "cart" in the

(i) 11 Cl. & F. 607. (j) 11 East 675; 12 *Ibid.* 439; 2 Taunton, 97.

(k) 12 Ir. C. L. Rep. 40, 41; and see his observations *Ibid.* 60.

(l) Co. Lit. 381 a. And see the remarks on *Rex v. Hodnett*, 1 T. R. 101, in *Reg. v. Showdar Ghenar*, 7 Bom. H. C. Rep., Cr. Ca. 40, and again *Ibid.*, p. 49; and the observations of Lord Cairns in *Partington v. The Attorney General*, L. Rep. 4, Ho. Lo. 122.

(m) 9 Ir. C. L. Rep. 214, 221, Q. B.

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Stat. 16 & 17 Vict., c. 112 (Dublin Carriage Act), must be limited to carts for hire, and not applied to carts for private use. If, under the special circumstances of the case, the liberal construction of an enactment would defeat its object and be wholly unreasonable, such a construction will not be adopted: *Hibernian Mine Company v. Tuke* (n). But in ordinary cases like the present there cannot be any doubt that it should be applied. We hold, accordingly, that copper pots are not liable to the municipal rate.

The conclusion to which we have come upon the first point renders it unnecessary to determine the second point, upon which, therefore, we shall only say a few words. The claim for rate made on copper pots returning unsold to the city whence they had been taken for the purpose of sale, is in the nature of what is in the old books called toll-turn (o) as distinguished from toll thorough (p) and toll traverse (q). Toll-turn is toll payable for cattle or goods on their return from a fair or market unsold: Bro. Ab. (Quo Warranto 3, and Toll 12); Cro. Eliz. 711, and 1 Siderfin (*Heshord v. Wills*) 454, where it is said "Et Toll-turn est pay sur return des avers d'un fair," &c. "Avers," alias "averia," include inanimate chattels, as well as cattle and beasts of burthen (r). One may be entitled to toll-turn by royal grant, or prescription, which presupposes a grant, or, no doubt, by legislative enactment, or bye-law duly made under a sufficient enactment; but it would be difficult to maintain that under a bye-law laying a toll or tax upon articles imported into a city "for consumption," goods on being brought back there, after an unsuccessful attempt to sell them in a village adjacent to the city, could properly be held liable to such toll or tax.

We are of opinion that copper pots do not come within the term "copper" in Appendix B to the Súrat Municipal Rules, but we feel compelled to give way to the objection of

(n) 8 Ir. C. L. Rep. 321, Q. B.

(o) Com. Dig. Toll (B); 20 Vin. Ab. Toll (A).

(p) Com. Dig. Toll (C). (q) Com. Dig. Toll (D.a.).

(r) Spelman, Gloss., Tit. Averia, p. 51 (3rd ed.); Bracton in fine Lib. 3: 1 Ducange Gloss. 487; Wharton (4th ed.), 102.

Mr. Dhirajlál Mathurádás, founded on Sec. 27 of Act XXIII. of 1861, that this suit being of the nature cognisable in a Court of Small Causes under Act XLII. of 1860, and the demand being under Rs. 500, no special appeal lies to this court.

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We, however, permit the plaintiff to withdraw his special appeal without costs, and thus the special appeal must be considered as having never been presented; and, under Sec. 376 of Act VIII. of 1859, he may apply to the District Judge for a review of his decree, which, under all of the circumstances of the case, we think, notwithstanding the lapse of more than ninety days, ought to be granted, and that on such review the District Judge ought to affirm the decree of the Assistant Judge with costs.

*Order accordingly.*

*Regular Appeal No. 13 of 1870.*

*Dec. 1.*

SAKHA'RA'M VITHAL A'DHIKARI ..... *Appellant.*

THE COLLECTOR OF RATNA'GIRI' *et al.* ..... *Respondents.*

*Sale of Land by Non-Judicial Order of Collector—Suit to recover Land so sold—Limitation—Act XIV. of 1859, Sec. 1., cl. 3.*

The "order" of a Collector or other officer of revenue, as the word is used in the latter portion of cl. 3 of Sec. 1. of Act XIV. of 1859, means an order of the nature of a decree, or made by the Collector or other revenue officer in his judicial capacity.

Where a piece of land, embraced within the operations of the Revenue Survey, and subjected to a defined assessment, was put up for sale by the Collector in consequence of the occupant refusing to pay a fine to be allowed to continue in occupation of it, and was purchased by one of the defendants, and the occupant, asserting that he had been wrongly dispossessed, sued to set aside the sale, and to be declared entitled to recover the land and retain possession of it, on condition of paying the assessment as settled upon it by the revenue officers, but delayed bringing his suit until June 1869, the sale having taken place in January 1867 :

*It was held* that, though more than one year had elapsed from the date of the sale, the suit was not barred under the provisions of cl. 3 of Sec. 1. of Act XIV. of 1859.

THIS was an appeal from the decision of A. Lyon, Acting Judge at Ratnágirí, in Original Suit No. 63 of 1869.

1871. It was heard on the 2nd of September 1870 by LLOYD  
 SAKHARÁM V. A'DHIKARI and KEMBALL, JJ.  
 v. Ráv Sáheb Vishvanáth Náráyaṇ Mandlik and Ganpatrá  
 COLLECTOR OF RATNÁGIRI Bháskar for the appellant.  
 et al.

*Dhirajlál Mathurádás* (Government Pleader) for the Collector, and *Shántáram Náráyaṇ* for the other respondents.

After argument the case was referred to the Full Bench with the following observations, from which the facts of the case fully appear :—

LLOYD, J.:—In this case Sakhárám Viṭhal A'dhikari sued the Collector of Ratnágiri and three others to obtain possession of certain land, which he alleges is ancestral property, of which he has had possession for upwards of forty years, but which, in the month of January 1867, the Collector, with the approval of the Superintendent of the Revenue Survey, sold to the defendant Rámchandra, who subsequently made the property over to Samsuddín.

On the issue of limitation raised by the defendants, the Acting District Judge expressed his opinion "that the claim is not barred, as, looking to the construction of cl. 3, Sec. 1. of Act. XIV. of 1859, I think the order of the Collector, as an executive officer, directing a sale of the property of another, is not such an order as is contemplated by that clause. Cl. 3 refers evidently to an order of a judicial nature made by a Collector sitting in a court of justice;" but he threw out the claim, because the plaintiff failed to prove that he was the occupant of the land within the meaning of Sec. 3 of Reg. XVII. of 1827.

Against this decree Sakhárám Viṭhal has preferred an appeal, and I am of opinion that Mr. Lyon has disposed of the case too summarily, and not allowed sufficient time to the plaintiff to secure the attendance of his witnesses, as it appears, on reference to the papers on the record, that the summonses were not served till so late a date that it was hardly possible for the witnesses to attend at the District Court on the day on which the case was decided, and, there-



fore, I think the case should be remanded in order that the witnesses may be examined. But the *vakils* for the defendants are opposed to this, on the ground that the claim is barred under cl. 3, Sec. 1. of the Limitation Act, which, they contend, has been wrongly interpreted by the District Judge; that the sale of the land having taken place in January 1867, and the plaint not having been filed until after the expiration of one year, namely, on the 12th of June 1869, the claim is inadmissible; and in support of their argument they refer to the decision passed in Miscellaneous Appeal No. 5 of 1870.

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On the other hand, the plaintiff's *vakils* uphold the view taken by the Acting Judge on the question of limitation, and allege that as the sale did not take place under Sec. 5 or Sec. 7 of Reg. XVII. of 1827, the only law under which the Collector has power to dispose of land, the order of the Collector was an arbitrary and illegal one, wholly opposed to Sec. 36 of Act I. of 1865, Bombay; and that as the words "order of a Collector," in cl. 3, Sec. 1. of the Limitation Act, must be construed with reference to the whole section, they should be held to refer to a judicial order, and, therefore, the limit of one year will not apply to this case. It appears to me that we should interpret such a provision of the law very strictly against the party setting it up in bar, and that it cannot have been the intention of the Legislature to curtail the limit provided for the recovery of immoveable property by cl. 12, Sec. 1. of the said Act in cases of this kind, when the order of the Collector is apparently one which he had no authority to issue; and I am myself inclined to coincide with the opinion of the Acting Judge. As, however, the question is one of some difficulty and of considerable importance, and there is a decision by two of my learned colleagues, which is deserving of the greatest respect, against my view, I think it desirable to make a reference to a Full Bench.

KEMBALL, J.:—I also am of opinion that it is advisable the question involved should be referred to a Full Bench. It is true that I was one of the Judges who gave the deci-



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sion, in Miscellaneous Appeal No. 5 of 1870 on Friday the 29th of July last, referred to by my brother Lloyd, but I did so doubtingly; and the point of limitation against the decision of the lower court, which held that the term of one year was applicable, was very imperfectly argued before us.

The case was, accordingly, on the 3rd of July 1871, argued before a Full Bench, consisting of WESTROPP, C.J., MELVILL, KEMBALL, and WEST, JJ.\*

*Cur. adv. vult.*

WESTROPP, C.J. :—The facts of the case out of which the present reference has arisen, are set forth in such detail in the previous proceedings, that a very brief recapitulation of these will suffice for the purposes of this judgment. A portion of land, apparently a *khár*—exposed, unless protected by artificial means, to inundations of the sea—situated within the operations of the Revenue Survey in the Ratnágirí District, and subjected to a defined assessment, was put up to sale by the Collector, and purchased by the third respondent. The appellant, asserting a wrongful dispossession of himself, sued, on his right as an occupant of the land before the Survey, to recover and retain possession of it, on condition only of paying the rent or assessment imposed upon it by the revenue officers of the Government. But this suit was not brought until June 1869, the sale having taken place in January 1867, and it is objected for the respondents that, more than a year having thus elapsed from the date of the Collector's order, the claim was barred by cl. 3, Sec. 1. of Act XIV. of 1859. The question we have to determine is whether this is so or not.

Cl. 3 of Sec. 1. of Act XIV. of 1859 provides for four classes of cases in which suits may be brought to set aside sales of land or other property :—

(1) Sales under decrees of Civil Courts ;

\* NOTE.—The judgment in this case was prepared by Mr. Justice West, but he having retired from the Bench on the return of Mr. Justice Lloyd from England before there was an opportunity of delivering it, it was, as above stated, delivered by Westropp, C. J., on behalf of himself and the other members of the Court.—ED.

(2) Sales for arrears of Government revenue or other demands recoverable in like manner ;

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(3) Sales of *paṭni tālukās* for current arrears of rent ;

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(4) "To suits to set aside the sale of any property, moveable or immoveable, sold in pursuance of any decree or order of a Collector or other officer of revenue, the period of one year from the date at which such sale was confirmed, or would otherwise have become final and conclusive if no such suit had been brought."

Within any one of the first three of these classes the present case cannot reasonably be brought. The Collector's order was not made in any judicial capacity. The sale was not one made for arrears of Government revenue ; it has not been contended that any such arrears, or other sums recoverable in the same manner as such arrears, were due. There was, no doubt, a "demand" made by the Collector—a demand of a fine or payment for the lease or occupancy of the land—but this was not a demand of the nature of a debt recoverable like an arrear of land revenue. It was merely one of the terms of a proposed bargain, which the plaintiff might accept or refuse at his option. With *paṭni tālukās* we have nothing to do on this side of India ; and the question is thus reduced to one of the proper construction of the fourth branch of cl. 3.

This, again, for the purposes of the present case, resolves itself into a question of the proper extension, that is, the extension intended by the Legislature of the words "or order" following the word "decree." The word "order," being more general and comprehensive in its import, must undoubtedly, when it follows two or more words of a more confined and specific meaning, as for instance in Secs. 19, 20, and 21 of the Act under consideration, be construed as relating to the same class of subjects as the preceding words. The enumeration shows clearly to what class the mind of the Legislature was directed, and it is not to be supposed, without some express indication, that it was suddenly diverted to a different class. Here, as there is but a single

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term of more specific meaning preceding the more general word, the construction based on their immediate association is somewhat weaker, but still the law of congruity, which usually governs thought and expression, must be taken to have exercised its influence, unless there be something to show that this was not so. When a rule is laid down with reference to a decree or order, the impression naturally is of an "order" proceeding from the same, or at least a similar source, and of the same general character, and the distinction between administrative and judicial commands is so well recognised that an abrupt transition from the one species to the other would, we might expect, in all ordinary cases be clearly indicated. That the word "order," therefore, taken in its broadest sense, would include a class of cases bearing little or no resemblance to decrees, is not a sufficient reason for giving to it in this case so wide an extension. "A thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers" (Bac. Abr. VII., 458\*); and that intention can be gathered more certainly by attention to the specific words than to those of more general import, which are commonly employed to prevent cases not strictly comprehended within the more precise terms, though within the purpose of the Legislature, escaping from the operation of the new law (a).

These considerations point very strongly, as it seems to us, to the limitation of the sense of the word "order" in this place to that of an order of a judicial nature. If, indeed, such orders proceeding from a Collector were unknown to the law or of extremely rare occurrence, there might be some difficulty in adopting this interpretation, but this is by no means the case. Even under the Bombay Code, the Collector at the time when Act XIV. of 1869 became law was invested with judicial functions of an important character, which subsisted until the passing of Bombay Act II. of 1866, if in some respects they do not

\* Tit. Statute I. 5.

(a) *Hawkins v. Gathercole*, 6 De Gex, M., & G. 1; *Cope v. Doherty*, 2 De Gex & J. 623, 624, per *Turner*, L. J.

subsist at this moment. But the Limitation Act provided rules for the whole of British India; and in Bengal, as is well known, the Revenue Courts, presided over by the Collector and his Assistants, exercise an extensive and important jurisdiction. In such cases as those to which Secs. 86 and 110 of Act X. of 1859 relate, we find an appropriate and sufficient scope for the operation of the words "decree or order of a Collector or other officer of revenue," such as to give them full and due effect without any sudden and forced transfer of thought from one sphere of the Collector's duty to another entirely different.

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If, from the particular branch of cl. 3 which we have been considering, we pass to a consideration of the whole clause, we find the view we have taken corroborated. Each branch of the clause contemplates a deliberate proceeding taken upon due notice to the person affected, and with an opportunity to him to take steps to avert the evil of an unauthorised sale before it is consummated. In the case of sales under a decree of a Civil Court this is too plain to require any exposition. In the case of revenue defaulters, or of debtors to Government standing in the same position, ample provisions for notice and for opportunity to prevent needless injury are made in the laws authorising distraint and sale, whether we look to those, such as Act XI. of 1859, intended to operate in Bengal, or under the Bombay Code, to those contained in Reg. XVII. of 1827, Sec. XII., cl. 6, and kindred enactments. So also in the case of sales of *patni talukás*, as may be gathered from Bengal Reg. VIII. of 1819, Secs. 3 and 18, and the other enactments bearing on this subject. Now this being evidently the general principle of the clause that a deliberate and public proceeding of a judicial, or at least of a *quasi-judicial* character, shall be held a justification for refusing further inquiry after the lapse of so short a period as a year, we cannot reasonably suppose that a case was intended to be included in which, as in the one before us, there may have been none of those preliminary proceedings (b) which afford a *prima facie* safeguard against

(b) *Vide per Coleridge, J., in Cooper v. Harding, 7 Q. B. 941.*

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wrong to an owner of property. Taken where it stands in the clause, the branch of it which we are especially considering seems not intended to apply to orders of the administrative kind issued at the mere discretion or caprice of a revenue officer. The general operation of a Limitation Act is to withdraw from suitors and creditors rights, which they previously possessed, of prosecuting their claims at their convenience. There is no abstract injustice to any one in these rights, but for the sake of public convenience, and to prevent the possibility of false claims founded on the loss of evidence by which they might be rebutted, it has been found expedient to impose limits of time upon their exercise. But when a limitation of a common right is imposed, we must be careful not to make the restriction narrower than was intended by the Legislature. When the previously existing law, or right, has not been clearly abrogated, it must be taken as still subsisting. Applying this principle to the case before us, we must not carry the restriction further than will satisfy the obvious intention; the construction asked for by the respondents would in our view exceed that intention, and cannot be admitted. It is true that in the case of *Krishnáji Vishvanáth Joshi v. Mukund Chimanshet* (c) the late learned Chief Justice of this court adopted a rule of construction different from that which we have laid down. There, in a suit by the purchaser at an earlier sale in execution against a purchaser at a later sale, who had dispossessed him, the learned Chief Justice held that the suit was one to set aside a sale, and, guided by the supposed analogy of Secs. 246 and 247 of the Code of Civil Procedure, he determined that the claim was barred by the clause we are now considering. But the suit was not directly one to set aside a sale, though it might aim at a similar result, and the inclusion, within the operation of the clause, of a case not clearly comprehended in its terms, was on further consideration found unsustainable. In the subsequent case of *Lálchand Ambáidás v. Sakháráam valad Chandrábhái* (d) Sir Richard Couch says: "Cl. 3 of Sec. 1. of Act XIV. of 1859 is in terms applicable only to suits to set aside the sale, and the concluding words

(c) 2 Bom. H. C. Rep. 19. (d) 5 Bom. H. C. Rep., A. C. J. 139

appear to show that it should be construed strictly ; [they] are inapplicable to a suit where the dispossession is the cause of action." These cases are useful as an illustration of the principle that an Act diminishing a common right cannot safely be given, by judicial construction, an operation going beyond the plain intention of the Legislature. Before the latter of them had been decided, Sir Barnes Peacock, delivering the judgment of a Full Bench, had already adopted the principle of a strict construction in the case of *Partaub Chunder Chowdhry v. Brojo Lall Shaha and others* (e), and in another case at page 256 of the same volume. The case of *J. Poulson v. Modhoosoodun Paul Chowdhry*, reported at p.101 of the Full Bench Rulings of the High Court of Bengal (f), presents some features very similar to that now before us. There the question being whether the mention of "rents of any buildings or lands" in cl. 8, Sec. 1. of Act XIV. of 1859, superseded or not the express provisions as to rent-suits in Act X. of 1859, Norman, Acting Chief Justice, says, "the word 'lands' in clause 8 may have a sufficient meaning given to it by treating it as a term subordinate to houses, that is, as applying to houses and lands appurtenant thereto as distinguished from lands, forest rights, fisheries, and the like, in the sense in which the word is used in Sec. 23 of Act X. of 1859." The mere mention of "lands" was held not necessarily to include within the scope of the enactment all the cases which the term itself might etymologically comprise when there were indications that the purpose of the Legislature did not really extend so far.

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It appears to us, then, equally on principle and on authority, that the suit in this case is not barred by the operation of cl. 3, Sec. 1. of Act XIV. of 1859. The appeal will be remitted for disposal to the Division Court with this expression of our opinion.

1st December 1871. The case coming on before the Division Bench again, it was remanded for re-trial with reference to their judgment dated the 2nd of September 1870.

*Decree reversed and case remanded.*

(e) 7 Calc. W. Rep., Civ. R. 253. (f) S. C. 2 Calc. W. Rep., Act X., Rul. 21.

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Dec. 11.

*Special Appeal No. 346 of 1871.*

JOITA'RA'M BECHAR ..... Appellant.  
BA'I GANGA' ..... Respondent.

*Limitation—Act XIV. of 1859, Sec. 14—Computation of Period of  
Limitation—Prosecution of Suit in wrong Court.*

The question whether the plaintiff is entitled, in computing the period of limitation, to deduct the time occupied in prosecuting a former suit, depends in the first place upon the question whether the former suit was brought upon the same cause of action as the new suit. Where the plaintiff brought two suits, one against one branch of the family and the other against another branch, to recover a share of that portion of the property which was in the possession of each, and these suits were rejected on the ground of their having been improperly brought, it was held that in bringing a consolidated suit against all sharers for a general partition the plaintiff was not entitled to deduct the time occupied in prosecuting his former suits.

THIS was a special appeal from the decision of G. M. Macpherson, Acting Joint Judge of the District of Ahmedábád, in Appeal No. 318 of 1869, reversing the decree of the Munsif of Borsad.

One Motibá, the grandmother of the plaintiff, died in 1852, possessed of certain land, and leaving three daughters. In 1863 the plaintiff, a representative of one of the daughters, brought two suits for his third-share, one against the representatives of the second, and the other against the representatives of the third daughter. Each of these suits was rejected, on the ground that the plaintiff ought to have sued for a general partition in a consolidated suit against all the sharers, and that separate suits would not lie. A review was applied for, but was rejected; and the plaintiff, therefore, in 1866—that is, more than twelve years after the death of Motibá—brought the present suit for a general partition.

The defendants, *inter alia*, pleaded the Statute of Limitations. Their plea was disallowed by the court of first instance, but was allowed by the appellate court, which rejected the plaintiff's claim for the following reasons:—

“ It is argued that the cause of action is the same, that the *bona fides* and due diligence required existed, and that



the parties are the same, for the defendants to the original actions have been united, and they were all represented in one or other of the former suits.

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“Whether this argument as to the parties be right or wrong I need not inquire. The original suits were brought in the same court before which this one was brought, and it is the circumstances under which the original claim in appeal was dismissed that I have to consider. If the time is to be excluded from computation, the original suit must have been one in which the lower court's decision was annulled for want of jurisdiction, or any such cause.

“There have been very different opinions expressed as to the real meaning of the section (Sec. 14 of Act XIV. of 1859). Were it lawful for me to consider the Bill now before the Legislative Council on this subject, it would at once show the intention of the Legislature, but I cannot do so. It has been ruled in the High Court of Calcutta that the fact that the Lower Court was unable to decide on the claim must be one owing to no default or error on the plaintiff's part for which he could reasonably be held accountable. The subject is discussed at length in the case of *Chunder Madhub Chuckerbutty v. Bissessuree Debea and others* (a), and that of *Hurro Chunder Roy v. Shoorodhonee Debia* (b). I quote some of the opinions expressed in the former case. Chief Justice Peacock was of opinion that the words ‘or other cause’ must mean a cause of like nature as defect of jurisdiction. Now a defect of jurisdiction would be a cause that would not include any neglect on the part of the plaintiff either in stating his case or in other respects. His Lordship, with whom Mr. Justice Trevor concurred, went on to show that a court might often be unable to decide upon the cause of action, owing simply to the plaintiff's negligence. Again Mr. Justice Jackson says: ‘It appears to me that the inability of the court must be either some unavoidable circumstance over which no one has any control, or something incidental to the court itself, and unconnected with the acts of the parties.’ He thought the inability of the

(a) 6 Calc. W. Rep., Civ. R. 184.

(b) 9 *Ibid.* 402.



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courts to decide the case must arise from some cause quite unconnected with the default or negligence of the plaintiff. On the other hand, it was argued that every act of neglect on the plaintiff's part was not fatal, as the mere fact that the case was instituted in a wrong court, not having jurisdiction, must necessarily be in the eye of the law an act of neglect of the plaintiff. Now in the present case the Munsif clearly had jurisdiction over the subject-matter of the action and over the parties; but from the way in which the plaintiff brought the case he could not properly decide the claim on its merits. To enable him to do so, the plaintiff had to sue for more than he had sued for, and to sue more people. Therefore, clearly any inability on the part of the lower court, and of the Senior Assistant Judge's court in appeal, was owing to neglect on the part of the plaintiff. This, according to the opinions above quoted, would be fatal to the exclusion of the time during which the case was being tried. The above would have been a good ground for the plaintiff's applying for leave to withdraw from the suit with leave to bring a fresh action. But in that case he would not have had any allowance made for the time during which the suit had been pending.

“But there seems to me to be one word in Sec. 14 of Act XIV. of 1859 which deserves attention. It does not say that the plaintiff can exclude any time spent in prosecuting a suit the decision in which shall in appeal be reversed. The word used is much stronger, ‘annulled.’ This is not a word used to express a simple reversal of a decision. It implies something essentially wrong in the original decision, and affecting the power of the court to try the case, not because of some defect in the manner in which it is brought before it, but because of some fatal inability on the part of the court. This, however, may seem to be too technical a distinction. For instance, in Sec. 350 of Act VIII. of 1859 the word ‘annul’ is not used even when the matters affecting the jurisdiction of the court are referred to. This makes it the more remarkable that in Sec. 14 of Act XIV. of 1859 the word ‘annulled’ is used. I cannot but conclude from the use

of this word that the intention was to restrict the exception to cases affecting jurisdiction or some such thing. Sec. 350 says that no decision is to be reversed or modified on account of any matter not affecting the merits of the case or the jurisdiction of the court. In this case there was no doubt of the jurisdiction of the court, but it was impossible, owing to circumstances, to decide the case on its merits, and these circumstances resulted from the plaintiff's negligence or ignorance. Again, if the plaintiff were to be allowed to exclude the time he wishes to exclude from calculation in this suit, on the same principle it might happen that when the plaintiff in a suit found his mistake, and obtained leave to withdraw from it under Sec. 97, he might barely be in time to bring another suit, while if he had gone on with the suit and obtained a decree, which after some time was reversed in appeal because the case was not properly before the court, he could exclude from calculation all the time occupied in the trial of the case in both courts."

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Upon rejection of the plaintiff's claim by the appellate court on these grounds, he filed a special appeal, which was heard by MELVILL and KEMBALL, JJ., on the 27th of November 1871.

*Shántaráṃ Náráyaṇ*, for the special appellant :—The question is whether, under the 14th section of the Limitation Act of 1859—the plaintiff is entitled to deduct the time occupied in prosecuting his two previous suits. This section was framed with the special object of protecting those parties who sue in the wrong court. It says : "In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *boná fide*, and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded

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from such computation." The Bengal High Court have ruled in the case cited by the Judge that the words "or other cause" mean "other cause similar to defect of jurisdiction." In the absence of any ruling of this High Court, the Judge has followed that ruling. In the first place I submit that the Calcutta ruling is incorrect; in the second place, even if it be correct, the circumstances of this case fall within the meaning of that ruling. There is no reason why words not in the Act should be imported into it, so as to put a less liberal construction upon the other words already in it. Even the express language of a Limitation Act should be liberally construed: *Karuppan Chetty v. Veriyal* (c), *Mohun Chunder Koondoo v. Azeem Gazeem Chowkeedar* (d), *Maharajah Jugutendur Bunwaree v. Din Dayal Chatterjee* (e). But this suit is within limitation even if the Calcutta interpretation be held to be correct. The plaintiff brought two suits against two parties, and the court held that it could not try the plaintiff's claim in two different suits. It had no jurisdiction to try the claim in that shape, and it, therefore, directed that a consolidated suit should be brought. This is a cause of the same nature as a defect of jurisdiction.

*Nagindás Tulsidás*, for the special respondents:—That the Legislature intended by the words "or other cause" other cause of a like nature as the defect of jurisdiction, is clear from their inserting those words in Sec. 15 of the new Limitation Act (No. VII. of 1871). That which was judicially implied has now been expressly enacted. Limitation Acts should not be liberally construed.

MELVILL, J.:—We think we should decide the question raised in this case according to the same principle on which we have to-day decided a similar point of law raised in R. A. No. 59 of 1860.

The question whether the plaintiff is entitled, in computing the period of limitation, to deduct the time occupied in prosecuting his former suits, depends in the first place

(c) 4 Mad. H. C. Rep. 1.

(d) 12 Calc. W. Rep., Civ. R. 45.

(e) 1 *Ibid.* 310.

upon the question whether these suits were brought upon the same cause of action as the present suit. We are of opinion that they were not.

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The two former suits were brought, one against one branch of the family, and the other against another branch, to recover a share of that portion of the property which was in the possession of each branch. The claims were rejected on the ground that they were improperly brought, and that the plaintiff's proper course was to sue all the sharers for a general partition. The so-called cause of action in the former suits was the plaintiff's supposed right to be put in possession, previously to a general partition, of a definite share of each and every portion of the family property in the possession of any of the co-sharers. This was in reality no cause of action at all, for, to quote the words of the Judicial Committee of the Privy Council (*f*), "according to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share." The plaintiff now sues on what was and is his only real cause of action, namely, the right of one member of a Hindú family to enforce a general partition of the whole property by a suit brought against all the sharers.

On this ground we affirm the decree of the Joint Judge, with costs on the appellant.

*Decree affirmed.*

(*f*) *Approvier v. Rama Sabba Aiyan*, 11 Moo. Ind. App. 89.

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Dec. 21.

*Special Appeal No. 410 of 1871.*

FAKIRA', heir of BASA'PA' deceased.....*Appellant.*  
BASA'PA' MA'HA'DAN SHETTI.....*Respondent.*

*Review—Delay—Jurisdiction.*

After the expiration of the period allowed by law for making an application for a review, the Court has no jurisdiction to entertain it without just and reasonable ground to the satisfaction of the Court being assigned for the delay. Preferring an appeal is not a just and reasonable cause for not preferring an application for review.

Where the Court granted a review without any cause having been assigned for the delay, and varied its former decree, the High Court, reversing all that was done under the review, restored the former decree.

THIS was a special appeal from the decision of Baron A. De H. Larpent, Acting Judge of Dhárwár, amending in review the decree passed by J. R. Daniell, Assistant Judge at that station, in Appeal No. 132 of 1866, which reversed the decree of the Principal Šadr Amín of Dhárwár, rejecting the plaintiff's claim.

The plaintiff sued upon an agreement to recover a quantity of grain. The defendant denied the agreement, and pleaded non-indebtedness. The court of first instance rejected the claim, it being of opinion that the agreement was suspicious. Mr. Daniell, in appeal, found the agreement proved, and reversed the Principal Šadr Amín's decree on the 23rd of October 1866. On the 18th of February 1867 a special appeal was preferred against this decision to the High Court, which, on the 2nd of July 1867, permitted the defendant to withdraw his special appeal. On the 27th of September 1869, the plaintiff, without in any way accounting for the delay in preferring his application for review, represented that Mr. Daniell, although he had reversed the Principal Šadr Amín's decree rejecting his claim, had made no award in his favour, and requested that the award intended to be made in the judgment should be formally made in the decree. Baron De H. Larpent, to whom the application was made, granted the review, and on the 2nd of March 1871 awarded to the plaintiff a certain quan-

tity of grain or its value. Against this a special appeal was preferred. It was heard by LLOYD and KEMBALL, JJ.

*Dhirajlál Mathuradás*, Government Pleader, appeared for the appellant.

*Fakirápa Lingápá* appeared for the respondent.

PER CURIAM:—The decree in this case was passed on the 23rd of October 1866; the application for review was presented to the District Court on the 27th of September 1869. The law requires that the application shall be made within ninety days from the date of decree, unless “just and reasonable ground to the satisfaction of the Court” is shown for the delay.

No reason is assigned in the application for the delay, nor has the Judge, in his order allowing the review, made any reference to the subject. It is true that a special appeal was preferred to this court by the defendant, which was not disposed of till the 2nd of July 1867; but the time so occupied would not form a just and reasonable cause for the delay in preferring the application—*vide L. T. Lucas v. W. Stephen and others (a)*—and beyond this there is a period of more than two years altogether unaccounted for. We must, therefore, hold that the Judge had no jurisdiction to admit this application for review, and that all that has been done under it must fall to the ground.

The decree of the Judge, dated 2nd March 1871, must be reversed. Each party to bear his own costs.

*Decree reversed.*

(a) 9 Calc. W. Rep., Civ. R. 301.

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*Special Appeal No. 498 of 1870.*

RA'MSHET BACHA'SHET ..... *Appellant.*  
PANDHA'BINA'TH, son and heir of Krishnáji  
Bháu..... *Respondent.*

*Mortgage—Equity of Redemption—Foreclosure—Laches—Improvements—Repairs—Interest—Accounts.*

R. mortgaged certain land to A. in 1844, stipulating that if he (R.) failed to pay a moiety of the mortgage-money within three years, or wholly redeem within five years, from the date of the mortgage, the property mortgaged should be considered as sold to A. The property remained in the possession of R. till 1847, at the end of which he gave it into the possession of A., R. then believing that he had thereby lost all right to the property. Subsequently to 1847 the property changed hands. The absolute right was first sold in 1855, and then on two occasions in 1862. At this time R. did not raise any objection to the property being sold, although he was fully aware of the fact.

R. had also admitted, in a suit brought against him in 1850 by A., that he had sold the land to A.

In a suit brought by R. against A. in 1867 to redeem the mortgaged property—

*Held* (following the decision in Special Appeal No. 299 of 1864) (a) that R. was entitled to redeem the property.

*Held* also that, under the peculiar circumstances of this case, the court would not be justified in calling upon the mortgagees to furnish accounts of the rents and profits on the one hand, and of the principal and interest on the other.

Interest on the value of improvements made since the time the property came into the hands of A. disallowed.

THIS was a special appeal from the decision, on remand, of W. M. P. Coghlan, Acting District Judge at Tháná, in Appeal Suit No. 363 of 1868.

The special appeal was argued before GIBBS and WEST, JJ.

*Shántáram Náráyan* for the appellant.

*Dhirajlál Mathurádás* for the respondent.

The facts of the case, so far as material, appear from the judgment of the Court, delivered by

WEST, J.:—This was an action to redeem from mortgage, and recover possession of, a field alleged to have been mortgaged to the defendant. It was tried in the first instance by

(a) *Rámji v. Chinto*, 1 Bom. H. C. Rep. 199.

the Munsif of Alibág, who dismissed the claim, and his decree was confirmed by the District Judge at Tháná, Mr. A. Bosanquet. Both these courts being of opinion that the plaintiff had admitted, twenty years before the institution of his present suit, that the proprietary title in the field had passed from him, and that the field had, to his knowledge, changed hands twice, he lying by without making any objection; and that, therefore, the doctrine of equity, "once a mortgage always a mortgage," first recognized by this court in the case of *Rámji v. Chinto* (1 Bom. H. C. Rep. 199) should not be applied. A special appeal having been preferred to the High Court, WARDEN and LLOYD, JJ., considered that "the lower courts were in error in holding that the plaintiff had forfeited the equity of redemption, because he had in another suit, in which the subject of the mortgage was not at issue, made an admission that the mortgaged property had been sold to the mortgagee; their decisions being based solely upon this admission, and not on any proof of there having been any *bonâ-fide* sale of the property by any special agreement between the parties. The admission of the plaintiff was merely in accordance with the interpretation given to the law of mortgages at that time by the court in this Presidency, namely, that if property was not redeemed within the period fixed for foreclosure, the mortgagee acquired a proprietary title to it. In accordance with the decision in Special Appeal No. 299 of 1864, the court are of opinion that the plaintiff is entitled to redeem the property. The decrees of the lower courts are, therefore, reversed, and the case remanded for the investigation of the second and third issues framed by the Munsif. In trying these issues the principle laid down in Special Appeal No. 717 of 1863, Vol. II., p. 214, 2nd ed., should be borne in mind." These issues were: whether (1) the defendant A'tmárám has expended any money in improving the land; and (2) if the plaintiff be allowed to redeem the land, what amount should he pay, and to which of the defendants.

It is to be observed that the mortgage was effected in 1844 for Rs. 300, and that there was a stipulation that if the

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mortgagor failed to pay a moiety of the mortgage-money within three years, or wholly to redeem within five years, the property mortgaged should be considered as sold to the mortgagee. Possession of the mortgaged property remained with the mortgagor for three years, at the end of which it passed to the hands of the mortgagee, who then, according to the law of mortgage as recognised at the time, became the absolute owner. Subsequently to 1847 the property changed hands. The absolute right was first sold in 1855, and then on two occasions in 1862, and it is the representative of the latter purchaser of 1862 who is the defendant in the present suit.

The case in its present shape comes before us fettered to a certain extent by the decision of a Division Bench of this court. Had it come now before us for the first time, we might have dealt with it on other grounds, such as limitation; but as it is we are called upon to dispose of the case only so far as the new decree of the lower court requires us to do so. We say this because we might otherwise be considered to have passed over points which obviously would arise in such a case.

Mr. Shántarám has urged that the lower court ought to have directed an account to be taken of the rents and profits on the one hand, and of the principal and interest according to the mortgage-deed on the other. The effect of the case of *Rámji v. Chinto*, he urged, is not to create, in cases like the present, a new contract. It only wipes out the title which the mortgagee would, under the law as interpreted before that case, have acquired under his possession. He adds that though it might be impossible to obtain proper accounts from the year 1847 down to the institution of the suit, owing to the mortgaged property having changed hands, yet that we ought to direct the lower courts to arrive at an approximate result by an estimate of the profits realized on property situated in the neighbourhood of the property in dispute.

We think that under the peculiar circumstances of this case we should not be justified in calling upon the mort-

gagees to furnish accounts. This case differs from ordinary redemption cases in this, that here there was absolute delivery of possession to the mortgagee by the mortgagor, who, when he gave up that possession, fully knew that, as the law was then understood, he thereby lost all right to the property, and subsequently, though fully aware that the field was sold over and over again, he stood by in silence, and so led purchasers to believe that they were purchasing an unincumbered estate. After a lapse of twenty years he comes forward to take advantage of a new interpretation of the law of mortgage. In arriving at a decision on this question, all the facts of the case must be considered. It will be impossible to get proper accounts, and owing chiefly to the plaintiff's own lâches. On this point we may refer to Fisher on Mortgages, p. 881, where he says: "The account usually directed against the mortgagee in possession either of tangible property or of a business is of what he has, or without wilful default might have, received from the time of his taking possession. This, it is said, is the only instance in which the court directs an account in this form without any special case made for the purpose. And the mortgagee will not be subjected to it, unless it be shown, not merely that he was in possession, but that he was so in the character of mortgagee. If he enter and receive the rents under an agreement of tenancy, or in the real or supposed character of purchaser, or otherwise do not assume to receive them as mortgagee in possession, he will not be liable to this form of account."

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Mr. Shántarám has also objected to the award of interest on the value of improvements. The Judge below calculated the improvements at their present value, and we think he was thus far right; but he was in error in awarding interest upon the sum so fixed. He was apparently led into this error by failing to see the distinction which exists between improvements and repairs. The case of *Rágho v. Anáji* (5 Bom. H. C. Rep., A. C. J. 116), cited by him in support of his decision, was a case of repairs. There the Chief Justice and Mr. Justice Newton, concurring with the ruling of the Bengal High Court in *Jogendronath v. Raj Narain* in 9

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Calc. W. Rep., Civ. R. 488, remanded the cause for the lower court to inquire and determine what sums had been expended by the mortgagee in the proper and necessary repairs of the mortgaged property, and directed the lower court to pass a new decree allowing the same to the mortgagee with interest. If the mortgagor had remained in possession of his own property, he would naturally have kept it in repair; and it is, therefore, fair that when the mortgagee is in possession and expends money upon it for necessary repairs, the mortgagor should pay interest upon it, as it is expended on his behalf. In the case before us the expenditure incurred by the mortgagee is not of this nature, but optional—made for his own benefit, which has been his proper compensation, and not necessary for the maintenance of the mortgaged property in the state it was when it came into his hands. However reasonably he may have acted in making improvements, and however justly he may be entitled to their precise value, he cannot, according to the old maxim, be allowed by the accumulation of interest otherwise repaid, or entering into the present value of the improvements, to improve the mortgagor out of his estate. We must, therefore, disallow this item on account of interest. Finally, with regard to costs, we think that, under the peculiar circumstances of this case, each party should bear his own.

*Decree amended.*

*Special Appeal No. 280 of 1871.*1871.  
Sept. 25.

JA'NKIBA'I, widow of Raghunáth Chitko,  
and CHITKO RAGHUNA'TH.....*Appellants.*  
A'TMA'RA'M BA'BURA'V and YESA'JI ANANT. *Respondents.*

*Decree—Prior Agreement—Presumption—Plaintiffs appearing by  
different Pleaders.*

So long as a decree subsists unreversed and unvaried, the parties thereto and those claiming under them are bound by it, and no effect can be given to any prior agreement regarding the same matter on the ground that the terms of the decree differ from those of the prior agreement, notwithstanding that the parties had requested the court which passed the decree to draw it up according to the terms of the agreement.

It is irregular to admit any one as a co-appellant in a special appeal without giving notice to the special appellant.

Plaintiffs must all be represented by the same Pleader or set of Pleaders, and cannot be severally represented by different Pleaders.

THIS was a special appeal from the decision of A. Lyon, Assistant Judge of Ratnágirí, in Regular Appeal No. 9 of 1869, reversing the decree of the Subordinate Judge of Vingurlá.

The appellant, Jánkibái, sued to recover possession of one half of a godown, alleging that half of it belonged to herself, and the other half to the defendant A'tmárám. She stated that A'tmárám had sold the whole godown to the second defendant, Yesáji.

The defence mainly was that an agreement (exhibit No. 72) had been made between the plaintiff Jánkibái and Báburáv, father of A'tmárám, under which Báburáv obtained the whole godown in lieu of a dwelling-house which Jánkibái took for herself.

The Subordinate Judge decreed in favour of the plaintiff's claim. The decree, however, was reversed by the Assistant Judge in appeal. The following is an extract from his judgment:—

“ The second issue is as to the plaintiff's title. From the additional evidence recorded before me, this point reduces

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itself to a very short question. The plaintiff Jánkibái and the defendant, A'tmáram, were originally joint owners of the property. While an action was pending for a partition of the estate, an agreement, recorded No. 72, was drawn up between Jánkibái and A'tmáram settling how the property was to be divided. One of the clauses of that agreement gives to A'tmáram the whole of the *vakhár* (godown) now in dispute, in terms as distinct as it is possible to conceive. Jánkibái got instead thereof the house she was living in, and altogether the arrangement seems to have been most fair and equitable. At Jánkibái's own request, a decree was drawn up purporting to be in the terms of this compromise, which was also produced by her with her petition, but unfortunately the decree awards to Jánkibái half the *vakhár* in dispute, instead of declaring that she had no title to it whatever.

“The question to be decided is simply this: whether a decree such as this, drawn up by mistake, is to have effect in preference to the compromise. I think not: after the compromise was made the court had no authority to go on with the trial. The court had no authority to decide anything, as there was nothing left for it to decide. The compromise is the real decree in the case. That is the real and true conclusion to which the dispute was brought, and by that the parties must abide.

\* \* \* \* \*

“I reverse the Subordinate Judge's decree, and dismiss the plaintiff's claim.”

After the special appeal in the above case was registered, Chitko Raghunáth, on the 7th of August 1871, presented a petition to the High Court by his Pleader, Mr. Mánikshá, praying that he might be joined as a co-appellant in the special appeal, as a certificate of heirship was ordered by the District Judge of Ratnágirí to be granted to him (Chitko) and Jánkibái jointly. The petition was admitted by the court without any notice being given to the special appellant, Jánkibái.

The special appeal was argued before WESTROPP, C.J., and West, J., on the 26th of September 1871.

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*Ghanashám Nilkant*, for the appellant :—The District Judge was wrong in holding that the agreement between the plaintiff Jánkibái and A'tmárám's father, Báburáv, having been executed previously to the passing of the decree (exhibit No. 4), was to be preferred to the latter, because the parties had requested the court to draw up the decree according to the terms of that agreement. In doing so, the Judge gave preference to a simple contract over a contract of record about the same matter. Moreover, the District Judge ignored the fact that, although by the terms of the decree the appellant Jánkibái was entitled to the part of the godown now in dispute, A'tmárám took no objection to the decree on the ground of its differing from the terms of the agreement. Nor did he hitherto take any steps to have the decree amended if he considered it to be erroneous.

*Vishnu Ghanashám* for the respondents.

WESTROPP, C. J. :—The Court reverses the decree of the Assistant Judge, bearing date the 8th day of February 1871, and remands this cause for a fresh hearing on the merits, this court being of opinion that so long as the decree of the 22nd of September 1847 in Suit No. 160 of 1847, between Jánkibái as plaintiff and Báburáv Náráyan Rájádaksh and others as defendants (and which is exhibit No. 4 in this cause) was subsisting unreversed and unvaried, the parties thereto and those claiming under them respectively were bound thereby; and that, inasmuch as Yesáji claimed as purchaser under A'tmárám, the son of the said Báburáv, who was a defendant in the suit in which the said decree of the 22nd of December 1847 was made, the said Yesáji and his representatives are bound by that decree so long as the same may stand as it now is, and the Assistant Judge was in error in giving effect to the prior agreement No. 72. It may be, for aught that this court knows to the contrary, that the court which made that decree departed from the terms of the agreement No. 72 with the express assent of the parties in the suit No. 160 of 1847. Whether that was so or not, this

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court does not venture to express any opinion, nor whether, after the lapse of time which has taken place since the making of that decree, and under the circumstances of the case, either the court of original instance or any other court could now vary or reverse that decree.

The co-special appellant, Chitko Raghunáth, having without notice to Jánkibái, and, therefore, irregularly, been admitted as a party to the present special appeal, this court sets aside as irregular its order made on the 10th of August 1871, admitting him to be a party to this suit, and dismisses his petition presented on the 7th of August 1871 in that behalf. This court also remarks that it was a further irregularity on his part to attempt to be represented in this suit by a Pleader not appearing for, or instructed by, the plaintiff Jánkibái, inasmuch as the plaintiffs must all be represented by the same Pleader or set of Pleaders, and cannot be severally represented by different Pleaders.

This court abstains from giving any opinion as to the rights of Jánkibái and Chitko as between each other, or as to the right of either separately to maintain a suit in respect of the property here in dispute.

The plaintiff Jánkibái, having succeeded in this appeal, must have her costs thereof against the special respondents, Bábáji and A'ntáji, the representatives of the original defendant, Yesáji.

*Decree reversed and case remanded.*

*Special Appeal No. 607 of 1870.*1871.  
June 23.

BA'PUJI AUDITRA'M *et al.* ..... *Appellants.*  
 UMEDBHA'I HATHESING *et al.*, Trustees of  
 Lallubhái Pánáchand ..... *Respondents.*

*Jurisdiction—Withdrawal of Suit—Reg. II. of 1827, Sec. 43—Reg. I. of 1830, Sec. 3; and Sec. v., cl. 2—Hindú Law—Son's Liability for Father's Debt—Trust-Deed—Creditors.*

Where an objection to the jurisdiction of the court of first instance was taken for the first time in special appeal, being based on an illegal withdrawal of the suit by the District Judge from the Sadr Amín to the Assistant Judge's file :

It was held that the High Court was not bound to entertain the objection unless it was patent on the face of the record.

The assignment in a trust-deed, by which a person assigns all his property to trustees for the benefit of his creditors, protects the assets so assigned from all creditors.

Where a suit is brought against a Hindú son, personally and as representative of his father, to recover a debt due by the father, a decree ought to be given against the son, whether he has inherited any property or not, the result of such a decree in the case of non-inheritance being that it cannot be executed against the non-inheriting son.

THIS was a special appeal from the decision of F. D. Melvill, Acting Judge of the District of Ahmedábád, in Appeal Suit No. 138 of 1868, amending the decree of the Assistant Judge, M. H. Scott.

The plaintiffs, Bápuji Auditram and Jayakissen Narsidás, instituted the suit in the Court of the Principal Sadr Amín of Ahmedábád, to recover from Bhogilál Lallubhái the sum of Rs. 4,065, being principal and interest due on two *hundis* for Rs. 3,000 passed by the defendant's father, Lallubhái Pánáchand. They sought to recover this amount from Bhogilál personally and as representative of his father.

The District Judge of Ahmedábád withdrew the case from the file of the Principal Sadr Amín, and referred it to the Assistant Judge.

The defendant, Bhogilál, answered that his father (Lallubhái Pánáchand) had executed a trust-deed (18th April



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1865), and handed over the whole of his property and books to certain trustees for the purpose of winding up his business, giving notice of the same to all his creditors. He also stated that, as he had inherited nothing from his father, he was not liable for his debts.

Upon this, the Assistant Judge ordered the trustees (Umedbhái and others) to be made parties to the suit. They were, accordingly, joined as defendants.

On the investigation of the case, the Assistant Judge found that Bhogilál had inherited nothing from his father, and, therefore, held him not liable for the claim. He, however, decreed the amount of the suit to be paid out of the property of Lallubhái Pánáchand (24th September 1868).

Against this decision Umedbhái and the other trustees preferred an appeal to the District Judge of Ahmedábád (F. D. Melvill), who amended the decree of the Assistant Judge, by ordering the appellants (the trustees) to pay the amount claimed by the plaintiffs rateably with the other creditors of the estate of Lallubhái Pánáchand, first the principal and then the interest (25th August 1870).

Dissatisfied, the plaintiffs, Bápuji and Jayakissen, specially appealed to the High Court, on the grounds that (1) the court of first instance had no jurisdiction to try the case, and that (2) the lower appellate court was wrong in holding the plaintiffs bound by the terms of a deed of trust not signed or otherwise assented to by them.

The special appeal was heard before MELVILL and KENBALL, JJ.

*Nánabhái Haridás*, for the special appellants :—The Assistant Judge had no jurisdiction to try and determine this suit. It was instituted in the Court of the Principal Sadr Amín, and the District Judge withdrew it, and referred it to the Assistant Judge, without any of the grounds specified in Sec. 43, Reg. II. of 1827; Sec. 3, and cl. 2, Sec. v. of Reg. I. of 1830. The Judge could refer the case on those grounds only, and as it does not appear from the record that those grounds existed in the present case, the whole proceeding

of the Assistant Judge was illegal, because without jurisdiction. [MELVILL, J.:—You did not take that objection before the District Judge in appeal, and have raised it now for the first time in special appeal.] The objection to a court's jurisdiction may be taken at any time: *Motilál v. Jamnádás* (a); *Bidhobudden Mookerjee v. Doorga Monee Debia* (b); *Nobeen Kishen Mookerjee v. Shib Pershad Pattack* (c). With respect to the merits of the case, the trust-deed, as it was not signed, or in any way assented to, by the appellants, is not binding on them. They were not parties or privy to that instrument.

*Shántárám Náráyaṇ* for the special respondents.

PER CURIAM (MELVILL and KEMBALL, JJ.):—The objection to the jurisdiction is now raised for the first time, and we do not think that we are bound to entertain it, unless it is patent on the face of the record that the court of first instance had no jurisdiction. This is not so. The suit was withdrawn from the file of the Principal Śadr Amín by the District Judge, and referred by him to the Assistant Judge. These proceedings were legal if the withdrawal of the suit were made under the provisions of Sec. 43, Reg. II. of 1827, but not otherwise (see Sec. III., and Sec. v., cl. 2, of Reg. I. of 1830). There is nothing to show that the District Judge acted under Sec. 43, Reg. II. of 1827; but there is nothing to show also that he did not do so: and we do not think that we are bound, at this stage of the proceedings, to direct an inquiry whether there were sufficient grounds for an order, which the Judge was competent, on sufficient grounds, to make. The maxim "*Omnia præsumuntur rectè esse acta*" has more than ordinary force in cases of this kind, for it is reasonable to presume that if there had been an irregularity, the objection would have been raised at an earlier stage of the proceedings. At any rate, it was the duty of the plaintiffs to take the objection at the time when its validity could have been tested together with the other issues in the case, and we cannot admit it now, as the plaintiffs are not in a

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(a) 2 Bom. H. C. Rep. 40. (b) 2 Calc. W. Rep., Civ. R. 157.

(c) 7 Calc. W. Rep., Civ. R. 490.

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position to satisfy us, without a further inquiry, that the objection is valid. The case of *Motilál v. Jamnádás* (*suprà*), relied on by the appellant's Pleader, does not appear to us to be opposed to the view which we have taken. In that case the defect of jurisdiction appeared on the face of the record.

This suit was brought against Bhogilál to recover from him, personally and as representative of his father, Lallubháí Pánáchand, a debt due by his father. Bhogilál pleaded that he had inherited nothing from his father, who had executed a trust-deed vesting all his property in trustees for the benefit of his creditors. The Assistant Judge, therefore, made the trustees parties to the suit. It appears to us that this was an unnecessary and irregular proceeding, and that a decree ought to have been given against Bhogilál, as representative of his father, whether he had inherited any property or not. If he had had no property, the only result would have been that the decree could not have been executed against him. The Assistant Judge then proceeded to inquire into the case, and came to the conclusion that Lallubháí had vested all his estate in trustees; that Bhogilál had inherited nothing, and that personally, *i.e.*, merely as son of the deceased, he would not be liable. This seems to be the meaning of his judgment, and, construing this decree by the light of his judgment, we understand that he refused to give any decree against Bhogilál, either personally or as representative of his father. He, however, gave a decree against the estate of Lallubháí, by which he, no doubt, intended, though he did not properly express it, to give a decree against the trustees in whose hands he had found all the estate to be. Bhogilál having thus been exempted from all liability, it was necessary for the plaintiffs to have appealed, if they wished his liability to be declared in the decree; but this they failed to do. The trustees alone appealed, and the District Judge corrected the informality in the Assistant Judge's decree by declaring the trustees, and not the estate, liable. The plaintiffs having failed to correct the error in regard to Bhogilál by an appeal in the court below, and Bhogilál not having been a party to the District Judge's

decree at all, the plaintiffs cannot now bring him before this court with the view of obtaining a decree against him. As regards the trustees, they do not object to the decree which has been made against them ; but the plaintiffs ask that they may be ordered to pay the debt due to them in full, and not rateably. This would be inconsistent with the trust on which they hold the property. If the plaintiffs have any claim against them at all, it can only be such as is in accordance with the trust. Such assignments to trustees are, as remarked by Sausse, C. J., in *Bomanji v. Naoroji* (d), highly favoured by Courts of Equity, and in that case, as in the present, a creditor who had not signed the trust-deed was, nevertheless, held bound by it. Though the proceedings in this suit have been somewhat irregular, the final decision is in accordance with justice and equity, and no valid ground has been shown for interfering with it.

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(d) 1 Bom. H. C. Rep. 233.



**CROWN CASES**  
DECIDED IN THE  
**ORIGINAL AND APPELLATE JURISDICTIONS**  
OF THE  
**HIGH COURT OF BOMBAY.**

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REG. V. NA'NA' MOROJI.

1871.  
Jan. 16.

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*In re Mádhav Morár et al.*

*Gaming—Found Gaming—Warrant—Certiorari—Act XIII. of 1856, Secs. 57, 58, and 111—Act XLVIII. of 1860, Sec. 15.*

A warrant issued under Sec. 58 of Act XIII. of 1856 should be addressed to some one or more Inspectors, and not generally to "all Constables and Peace Officers." Where a warrant in the latter form was executed under the direction of an Inspector, it was held that the error in the form of the warrant was merely an error of procedure, and did not affect the validity of the conviction, under Sec. 57, of persons apprehended in pursuance of the warrant so executed.

Held, on the evidence, that there was sufficient to show that the house in which the prisoners were arrested was a common gaming-house.

A person is "found gaming," within the meaning of Sec. 57 of Act XIII. of 1856, who, having been *seen* gaming by an Inspector of Police, is shortly afterwards, in a place adjoining the room in which he was seen gaming, apprehended by Police Constables acting under the direction of such Inspector.

ON the 13th of January 1871, *M'Oulloch*, before GREEN, J., moved for and obtained a rule *nisi* for the issue of a writ of *certiorari* directed to Náná Moroji, Esquire, Officiating Third Magistrate of Police, for the removal of the proceedings taken before him on the 11th of January 1871, in the matter of a complaint made against the prisoners, Mádhav Morár and twelve others, and the convictions of the said prisoners, and the order on two of the said prisoners, C. P. Muhammad and Tár Sulemán, to pay a fine of Rs. 100 each.

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The rule was granted upon an affidavit of Mr. Khandarav Moroji, stating that the prisoners were tried before Nana Moroji, Esquire, on the 27th of December 1870 and the 5th and 11th of January 1871, on a charge of "being found in a common gaming-house gaming with dice and money on the 27th day of December 1870, under Sec. 57 of Act XIII. of 1856," and were, on the 11th of January 1871, convicted of the said offence, and sentenced (with the exception of C. P. Muhammad and Tar Suleman) to one month's imprisonment in the County Jail with hard labour, and that C. P. Muhammad and Tar Suleman were sentenced to pay a fine of Rs. 100 each, or in default to suffer one month's imprisonment with hard labour, and were unable to pay the fine.

The affidavit then verified the evidence given before the Magistrate and the warrants put in at the trial.

William Price, an Inspector of Police, had, at the trial, produced four warrants, bearing different dates, but all in a similar form, and deposed that he arrested the prisoners under the one bearing date August 1870. It was in the following form:—

"To all Constables and Peace Officers for the Town and Island of Bombay.

"Town and Island of Bombay. Whereas complaint has this day been made upon solemn affirmation before me, Frank H. Souter, Esquire, Commissioner of Police for the Town and Island of Bombay, by Haji Hassan against Haji A'dam, Haji Ghachi, and Pitambar Umarsi, for keeping a common gaming-house :

"These are, therefore, in Her Majesty's name to charge and command you to enter, with such assistance as may be found necessary, by night and by day, and by force if necessary, the said common gaming-house, situated at Bheendi Bazar, kept by the said Haji A'dam, Haji Ghachi, and Pitambar Umarsi, and to take them into custody, and all persons whom you may find therein, and to seize all instruments of gaming and all moneys and securities for money found therein, and to search all parts of the house, room, or place which you shall have so entered where you have reason to believe that any instruments of gaming are concealed, and to search the persons of those you may so take into custody, and to seize and take possession of all cards, dice, counters, and other instruments of gaming which you shall find upon such search.

"And you are hereby further charged and commanded to bring before one of the Magistrates of Police for the said Town and Island all such

persons so apprehended, that they may answer the premises and be further dealt with according to law. Herein fail not, and for your so doing this shall be your warrant.

“ Given under hand and seal this day of August 1870.

(Signed) “ F. H. SOUTER,

“ Commissioner of Police.”

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William Price had further deposed that, in pursuance of the above warrant, “ he went to a house in Bhenḍi Bazár, with about fifteen other police officers, between twelve and one on the morning of the 27th of December 1870, and saw the prisoners and other persons in a room on the fifth story. He looked through a barred window from an adjoining room. He knocked the bars out with a hammer. By the time he got in, all the persons that had been in the room had got on the neighbouring roofs. Other police officers had got in before him from other directions. Most of the prisoners were arrested on the tiles. When he first looked through, the prisoners were playing with dice, cards, and money. The prisoners were searched, and moneys were found on their persons. The house belonged to Háji Gháchi. It had to his knowledge been used for a long time for gambling purposes. Warrants had been repeatedly issued for seizing gamblers in that house. He had seen all the prisoners before the above occasion so as to be able to recognise them. He looked through the window for about thirty seconds. No one was arrested in the room. He could not say to whom the warrant was in particular given by the Commissioner. At the time of the arrest it was in the possession of Mr. Hallums, a Superintendent of Police.”

Ratanji Jivanji had deposed that he had been in the house in question gambling from 10 P.M. of the 26th of December to 1 A.M. of the 27th, and that all the prisoners were there at the same time gambling. He sent and gave information to William Price. The house belonged to Háji Gháchi.

James Cumming, an Inspector of Police, had deposed to arresting one of the prisoners on the staircase of the house in question, and two others as they were getting out of a window in the gaming-room. He had to break open a door to



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get upstairs. He found, in the room in which the prisoners had been gambling, cards and dice and money scattered about the floor; also several pairs of shoes and several *pagdis*, which were subsequently claimed by the prisoners.

Mir Abdul Alí, an Inspector of Police, had stated "that he had known the house for four or five years, and that he knew the house had been used for gambling purposes, that the proprietor's name was Háji Gháchi, and that the upper story of the house had been used for gaming; people were living in the other parts." In cross-examination he had said that from inquiries made he stated that the house was used for gaming purposes. The rest of the prisoners were arrested, some on the tiles of the house in dispute and neighbouring houses, and some concealed in neighbouring rooms.

*M'Culloch* contended (I.) that the warrant under which the prisoners had been apprehended was illegal, the provisions of Act XIII. of 1856, Sec. 58, not having been complied with, as that section requires the warrant to be issued to some Inspector or superior officer of police, who should be specified, and does not authorise a warrant addressed to "all Constables" (see Sec. 25); that, the warrant being illegal, the arrest and conviction founded upon it were also illegal. (II.) That Sec. 57 of Act XIII. of 1856 contemplates that the "finding" of persons gaming must be a "finding" of them by an Inspector duly authorised to find, under Sec. 58 of that Act; that a finding by one of the public, or by an inferior officer of police, was not contemplated by the Act; that (Bombay) Act III. of 1866 showed that the meaning of Sec. 57 contended for was its true meaning; and that, Price not having been duly authorised to act under the provisions of Sec. 58, the prisoners had not been found gaming within the meaning of Sec. 57. (III.) That as a matter of fact the prisoners were not "found gaming." "Found gaming" is by no means equivalent to "proved to have been gaming," nor to "seen gaming." The Act evidently contemplated that the gamblers should be taken "red-handed." If that were not so, there would be no limit to the vexation and annoyance that persons might be sub-

jected to. If the Legislature intended that Sec. 57 should embrace a case like the present, they would have used words such as are used in Sec. 86: "A Police officer may arrest without a warrant any person committing *in his view*," &c. (IV.) That there was no evidence of this being a gaming-house. A gaming-house must be limited to mean a house open to the public for gaming purposes. Sec. 15 of Act XLVIII. of 1860 will, no doubt, be relied on, but there is no evidence of information on oath having been given to the Commissioner of Police, and the warrant of itself is no proof of the truth of the facts recited in it.

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*Ferguson*, on the 14th of January, showed cause against the rule. He objected that no ground for a *certiorari* was suggested on the affidavit: Paley on Convictions, p. 412 (5th ed.); *Reg. v. Eaton (a)*. [GREEN, J.:—Surely grounds of law need not appear on affidavit. Here the affidavit verifies the evidence, and the grounds on which the rule was granted were purely legal grounds arising out of that evidence.]\* A conviction can only be quashed on the merits, and not for error of form or procedure: Act XIII. of 1856, Sec. 111. The objections raised to the conviction are formal objections, and do not go to the merits. No warrant was, in fact, necessary: Sec. 86. If, however, it be said that the police who made the arrests were not the police in whose view the offence was committed, then I say the warrants are in substantial compliance with Sec. 58, but in any view the arrest forms no portion of the conviction. The prisoners were "found gaming." The construction of these words contended for on the other side would completely defeat the object of the Act. If under Sec. 15 of Act XLVIII. of 1860 the warrant does not show that this was a common gaming-house, there is quite sufficient evidence of that fact upon the depositions.

*Cur. adv. vult.*

(a) 2 Term Rep. 89.

\* Mr. Ferguson also objected that six days' notice of the application should have been given to the prosecution, under 13 Geo. II., c. 18, s. 5, in analogy with the English practice, but waived his right to insist upon it.

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16th January. GREEN, J.:—In this matter an application has been made to this court to remove by *certiorari*, for the purpose of quashing, from the court of Náná Moroji, Esquire, Third Magistrate of Police in Bombay, certain proceedings against one Mádhav Morár and twelve others. These persons were, on the 27th of December 1870, charged before that Magistrate, and on the 11th of January convicted by him, of an offence under Sec. 58 of the Police Act (XIII. of 1856), namely, being found in a common gaming-house, gaming with dice and money, and were by him sentenced to punishments not exceeding those provided by that section. On the 13th of January an application was made to this court (grounded on an affidavit of Mr. Khandéráv Moroji, solicitor), by Mr. M'Culloch on behalf of the prisoners, for a writ of *certiorari* to remove the proceedings, and a rule was granted calling on the Magistrate to show cause why such writ should not issue, which by arrangement was argued the following day, Mr. Ferguson appearing to show cause on behalf of the Magistrate. The right of a defendant to this writ is not *ex debito justitiæ*, but the issue of it is discretionary with the court, and, the matter having been fully discussed on both sides on the rule to show cause, the court is in a position to judge whether there is any probable ground for supposing that injustice has been done before the Magistrate, so as to make the present a proper case for removing the conviction in order to have an opportunity of reviewing it. The objections taken to the validity of the conviction in the present case were as follows:—1st, that the warrant of the Commissioner of Police, under which the police officers acted in entering the house or place in question, and in arresting the accused, was irregular in being addressed to all constables and peace officers, whereas by Sec. 58 of Act XIII. of 1856 the Commissioner of Police can give authority only to an Inspector or superior officer of police; and 2nd, that, supposing the facts deposed to before the Magistrate to be true, as alleged, they do not constitute the offence described in Sec. 57 of the Act in question—of being found in a house, room, or place, kept or used for the purpose of gaming being

carried on therein, playing or gaming with cards, dice, counters, money, or other instruments of gaming—inasmuch as it is not sufficient for a person to be seen gaming in such a house, room, or place, but he must be found there doing so by an Inspector or superior officer of police duly authorised and acting under such authority. With regard to the first objection, I am of opinion that, as a matter of form, a warrant issued under Sec. 58 should be addressed, not as in the present case to all constables and peace officers, but to some one or more Inspectors or superior officers of police, or, at any rate, to Inspectors or superior officers of police generally. But this error, if error there be, is, in my opinion, one of form only, as the warrant appears to have been in fact executed by an Inspector of police with the assistance of other Inspectors and constables acting in conjunction with him. Besides this, any irregularity, if irregularity there was, in the warrant, or execution of the warrant, to enter and arrest, would not, in my opinion, affect the validity of the conviction by the Magistrate for the purpose of this application, having regard to Sec. 111 of the same Act, which provides that no conviction, order, or judgment of a Magistrate shall be quashed for error of form or procedure, but only on the merits. With regard to the second objection, it was contended that there was no evidence that the house or room in question was used as a common gaming-house. I agree that the recitals in the warrant to the effect that complaint had been made on solemn affirmation before the Commissioner of Police against one Hájí A'dam, Hájí Gháchi, and Pitámbar Umarsi for keeping a common gaming-house, namely, the place in question here, are not in themselves evidence that such complaint had been made, or that the house or place was so used, and that Act XLVIII. of 1860, Sec. 15 (which is an Act to amend Act XIII. of 1856), providing what shall be deemed *primâ facie* evidence of the use of a house, room, or place as a common gaming-house, does not apply to the present case. But I am of opinion that the evidence of Mr. Price, the Inspector of Police, of Ratanji Jivanji, and of Mir Abdul Alí, also an Inspector of Police, being believed by the Magistrate, was amply sufficient to

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warrant the conclusion that the place in question was used as a common gaming-house. Then it is contended that the prisoners were not "found" gaming in a common gaming-house. The evidence is that Inspector Price, looking through a window, saw them in the place in question playing with dice, cards, and money. Only two of them, it appears, were arrested in the room itself, the others being arrested elsewhere, and, with the exception of one of them, not in that house at all, but in closely adjoining places, and none of them were actually arrested by the officer who saw the gaming going on. But, in my opinion, the proper construction to be put on this section does not require that the accused should be actually arrested in the place where the gaming has been going on. It is not necessary to go so far as to say that the section would apply to a case in which some person has seen others gaming in a common gaming-house, and then goes and obtains a warrant and prefers the charge. But in the present case a warrant had been issued on sworn information, and the seeing of the gaming going on by the Inspector, and the arrest of those who were engaged in it, must, I think, be considered to form part of one transaction, and as a connected series of facts constituting the finding; and it would, in my opinion, be an unreasonable construction of the Act to hold that persons are not found gaming when they are seen doing so by an Inspector of Police, and are forthwith arrested by police officers assisting the Inspector who so saw them, though the arrest may not have taken place in the very house or room where the gaming was seen to take place. Being of opinion that the objections taken to this conviction—so far, at any rate, as they concern the merits of the case—ought not to prevail, I must allow the cause shown and discharge the rule.\*

Attorney for the prisoners: *Khandarav Moroji*.

Attorney for the Magistrate: *R. V. Hearn*, Government Solicitor.

\* The rule was discharged with costs upon the authority of an unreported case decided by Couch, C. J.

## REG. V. MUHAMMAD ALI' valad ABDUL ALI'.

1868.  
Oct. 12.*Whipping Act—Juvenile Offender.*

Under Act VI. of 1864 (the Whipping Act) a juvenile offender means a person under the age of sixteen years.

MUHAMMAD ALI' valad Abdul Ali, a Boráh shopkeeper of Barhánpur, aged eighteen years, was charged, under Sec. 268 of the Indian Penal Code, with being guilty of a public nuisance, in having caused annoyance to the passengers at the Nimborá railway station by making a great disturbance on the railway station on the 7th of June 1868. He was convicted under Sec. 290 of the Indian Penal Code by Captain T. E. Britten, F. P. Magistrate at Bhosáwal, and was sentenced to receive thirty stripes with a rattan, under Secs. 5 and 10 of Act VI. of 1864.

Upon a review of the monthly criminal returns, the papers in this case were called for by TUCKER, J., to determine the question whether the sentence awarded was legal, and whether the accused was a juvenile offender. "Offenders under Sec. 290 of the Indian Penal Code are ordinarily punishable with fine alone. But the F. P. Magistrate proceeded under Sec. 5 of Act VI. of 1864, which provides that juvenile offenders may, in the cases of all offences not punishable with death, be punished with whipping in lieu of any other punishment provided by the Indian Penal Code, and, holding the accused to be a juvenile offender, sentenced him to the highest punishment under Sec. 10 of Act VI. of 1864."

The case was considered by NEWTON and TUCKER, JJ., who on the 12th of October 1868 made the following order:—

PER CURIAM:—The Court reverses the conviction and sentence, 1stly, because the accused, being described on the record as eighteen years of age, could not be legally treated as a juvenile offender—Sec. 433 of the Criminal Procedure Code, which provides for the punishment of youthful offenders in reformatories, declares this class of offenders to be persons under the age of sixteen. And 2ndly, because the acts found

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to be proved against the accused, namely, that he had refused, with much clamour, to pay the difference between a third-class and a fourth-class railway fare, and had seized the belt of the railway policeman who detained him, with the view of ascertaining the policeman's number, cannot reasonably be held to amount to the commission of a public nuisance under the circumstances under which it occurred. The accused, who is a shopkeeper at Barhánpur, travelled on the G. I. P. Railway from the station near that town to Nimborá in a third-class carriage with a fourth-class ticket. He appears to have remained in the carriage in which he was found, with the knowledge and acquiescence of the station-master at Barhánpur, as the guard of the train deposed that the station-master at Barhánpur had informed him that the accused was in a better class of carriage than his ticket entitled him to use, and had said that the accused would pay the excess fare at Nimborá. The accused stated that he was put into a third-class carriage by the station-master at Barhánpur, because the fourth-class carriages were full, and the guard admitted that it was the custom to put fourth-class passengers in third-class carriages when the fourth-class carriages were full, but added that on the occasion in question there was plenty of room in the fourth-class carriages. If the latter part of the guard's statement be true, the station-master at Barhánpur would seem to have acted improperly in letting the accused, whom he knew to have a fourth-class ticket, remain in a third-class carriage; and certainly, without ascertaining from this official whether the statement of the accused was true or false, the accused should not have been punished criminally for noisily refusing in the first instance to pay the difference between the two fares. In flogging the accused for an act of this description, there has been an abuse of reasonable discretion on the part of Captain Britten, the Full Power Magistrate.

*Conviction and sentence reversed.*



## REG. V. NA'THA' KALYA'N and BA'I LAKHI.

1871.  
Jan. 19.*Hindú Wife—Theft of Pallá—Strídhan.*

A Hindú woman who removes from the possession of her husband, and without his consent, her *pallá* or *strídhan*, cannot be convicted of theft, nor can any person who joins her in removing it be convicted of that offence.

THE prisoners were tried and convicted of theft by G. Ayerst, Assistant Judge of Súrat, at Broach, and sentenced each to eighteen months' rigorous imprisonment.

The prisoner Lakhi was the wife of the complainant, and the prisoner Náthá was her paramour. Watching an opportunity in the absence of the complainant, they removed certain property, part of which was found by the trying authority to consist of Báí Lakhi's *strídhan*, and part of some money.

The appeal was argued before GIBBS and MELVILL, JJ.

*Nánábhái Haridás* for the appellant.

PER CURIAM :—The Court is not satisfied, from the evidence in the case, that the female prisoner took any property from her husband other than her *pallá* or *strídhan*. Therefore, without going into the question and deciding whether a Hindú wife can be convicted of stealing her husband's property, the court is of opinion that she cannot be convicted of theft for taking away her own *pallá*, for over that her ownership on this side of India seems undoubted. (See *Muyaram Rajaram and another v. Govind Ruttonjee* (a); *Wullubhram Oomayushunkur v. Bijlee* (b); *Mayúkha*, Ch. IV., ss. 9 and 10,\* and *Doe on the demise of Kullamal against Kuppu Pillai* (c).

The conviction and sentence on the female prisoner must, therefore, be reversed.

As, therefore, the woman, in removing this property committed no crime, it follows that the male prisoner must also be acquitted.

The conviction and sentence against him are also reversed.

*Convictions and sentences reversed.*

(a) 2 Borr. 270 (edn. of 1863).

(b) *Ibid.* 481.

\* Stokes' Hindú Law Books, p. 100. (c) 1 Mad. H. C. Rep. 85.



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Feb. 9.

REG. V. DHARMAYA' valad SANGA'PA'.

*Crim. Proc. Code Schedule—Jurisdiction—Subordinate Magistrate—Municipal Rules, Breach of.*

By virtue of the ~~7th explanatory note~~ and last part of the Schedule headed "Offences against other Laws," added to the Code of Criminal Procedure by Act VIII. of 1869, a Subordinate Magistrate, Second Class, can take cognisance of the offence of a breach of the municipal rules promulgated under Act XXVI. of 1850.

THIS was a reference from H. N. B. Erskine, Magistrate of the district of Násik, forwarding the record and proceedings, under Sec. 434 of the Criminal Procedure Code, of the Subordinate Magistrate, Second Class, at Egatpurá, in which he had fined the prisoner, Dharmayá, four annas for having committed a breach of the municipal rules duly promulgated in that town.

The reference stated: "As the Honorable the Judge ruled, in the case of *Reg. v. Malhárji bin Nauloji (a)*, that a Subordinate Magistrate has no jurisdiction to impose a penalty for breach of a rule made under Act XXVI. of 1850. the sentence seems illegal, and for this reason the proceedings are now forwarded. The Subordinate Magistrate considers that he has authority since the passing of Act VIII. of 1869. in consequence of the last part of the schedule headed "Offences against other Laws," which gives any Magistrate power to dispose of cases punishable with fine only, or with imprisonment for less than one year. On reading the 7th of the explanatory notes at the commencement of the schedule. I have doubts whether the Subordinate Magistrate's view can be upheld. If it can, it would be of great importance that this should be generally known, as in many towns the municipal rules are merely a dead letter, because the only resident Magistrate cannot enforce them."

The reference was heard before LLOYD and KEMBALL, JJ.

PER CURIAM:—The Court is of opinion that the Subordinate Magistrate had jurisdiction to impose a fine for breach

(a) 3 Bom. H. C. Rep., Cr. Ca. 36.

of a municipal rule. The Court refers the District Magistrate to the court's ruling, of 17th November last, in the case of *Reg. v. Lakhá Jibhái* in the printed Statement of Criminal Rulings on the Code of Criminal Procedure from 1st July to 31st December 1869.

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*Papers returned.*

REG. V. SOUTER.

April 4.

*In re Rávji bin Keshav.*

*Extradition—Gáikvád's Treaty—Accused person—Preliminary Inquiry—Warrant—Act VII. of 1854, Sec. 23—Act XVII. of 1862, Schedule.*

Sec. 23 of Act VII. of 1854 is not repealed by the Schedule to Act XVII. of 1862.

The treaty of the 6th of November 1817 between H. H. the Gáikvád of Barodá and the East India Company provides for the delivery upon requisition of accused persons to H. H. the Gáikvád *in a manner other than* in accordance with the provisions of the sections of Act VII. of 1854 prior to the 23rd section. The latter section is, therefore, applicable in such a case.

*Semble* that Government would not be justified in delivering up an accused person to H. H. the Gaikvád without holding a preliminary inquiry into the guilt of such accused.

Where a warrant issued under Sec. 23 of Act VII. of 1854 directed the accused person to be delivered up to the Resident at Barodá, without showing either that an inquiry had been made, or was about to be made, the Court held that it was not, therefore, invalid, as the presumption was that the accused was to be delivered up to the Resident in order that that officer might institute such an inquiry as is required by the Act.

A warrant issued under Sec. 23 of the Act should recite either that an inquiry has been held, or is about to be held, with reference to the guilt of the accused.

ON the 3rd of April 1871, before GREEN, J., *Macpherson* moved for and obtained a writ of *habeas corpus* directed to F. H. Souter, Esquire, Commissioner of Police for the City and Island of Bombay, and to all other police officers of the said city and island, to bring up the body of Rávji bin Keshav on the 4th of April, together with the day and cause of his being taken, &c.

The writ was granted upon reading the affidavit of Rustamji Mehervánji Nárelvála, which was as follows:—

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"One Rávji bin Keshav was this morning, as I am informed and believe, sent for by Mr. Souter, the Commissioner of Police, and was by him arrested, under a warrant signed by Mr. W. Wedderburn, the Political Secretary of the Government of Bombay, on a charge of criminal breach of trust.

"Such warrant purported to be executed under the provisions of Sec. 23 of Act VII. of 1854.

"I am informed and believe that the said arrest ought to have been made, and the practice followed which is pointed out, by Sec. 7 of the said Act, and that the said Rávji bin Keshav ought to have been brought before a Magistrate or Justice of the Peace for inquiries to be made.

"I am informed by the said Mr. Souter that he has received no instructions to adopt the course so laid down in Sec. 7, and, on the contrary, is directed by the said warrant at once to send the said Rávji bin Keshav to be delivered to the Political Resident at Barodá, and I am further informed and believe that the said Rávji bin Keshav will be sent in custody to Barodá, by this evening's train, without any inquiry having been made as to the validity of the charge against him.

"I, therefore, pray that a writ of *habeas corpus* may be issued by this Honorable Court, and a rule *nisi* to show cause why an inquiry should not be made, and the usual steps taken, as directed by Sec. 7 of the said Act."

On the 4th of April, Rávji bin Keshav was produced in court by Mr. Souter, together with the warrant under which Rávji bin Keshav had been arrested. The warrant (which was accompanied by a letter from Mr. Wedderburn, Acting Secretary to Government, forwarding the warrant, and requesting that Rávji might not be subjected to more restraint than should appear necessary to ensure his safe custody) ran thus :--

" WARRANT.

" To the Commissioner of Police, Bombay.

" Whereas requisition has been made to His Excellency the Governor of Bombay in Council by His Highness the Gáikvád for the surrender of Rávji bin Keshav, charged with having committed criminal breach of trust in the territory of Barodá, you are hereby required, under the provisions of Sec. 23 of Act VII. of 1854, to cause the said Rávji bin Keshav to be conveyed in custody out of the British territories for the purpose of delivering him to the Resident at Barodá.

" W. WEDDERBURN,

" Secretary to Government.

" *Bombay Castle, 1st April 1871.*"

The Acting Advocate General (*the Honorable A. R. Scoble*) showed cause :—The prisoner is in custody under a legal warrant issued in conformity with the provisions of Act VII.

of 1854, Sec. 23. That section authorises the Government to deliver up any person liable to be proceeded against by any foreign State, in accordance with the stipulations contained in any treaty that may exist between the Government and such foreign State, upon requisition made by such foreign State. The existing treaty between the Gáikvád and the British Government (dated 6th November 1817) will be found at page 330 of the 6th volume of Mr. Aitchison's Collection of Treaties. The 9th article contains the following provision: "It is, therefore, hereby agreed that offenders taking refuge in the jurisdiction of either party shall be surrendered on demand without delay or hesitation." That is an extradition treaty of the widest possible nature, and to carry it into effect the Government have issued the present warrant. All the requirements of the Act have been complied with. (I.) Requisition has been made by the Gáikvád. (II.) There is a treaty between him and the British Government. (III.) There is a warrant signed by Mr. Wedderburn, Secretary to Government, which is the proceeding for carrying into effect the treaty which the Government has "thought fit to adopt." Sec. 23 of Act VII. of 1854 is untouched by Act XVII. of 1852, which repeals Act VII. of 1854 only so far as it relates to warrants not issued under its provisions.

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*M'Culloch*, in support of the rule:—(1.) This is not a case falling within the purview of Sec. 23. That section only relates to cases not expressly provided for by Act VII. of 1854, or, in other words, to offences which are not heinous: the offence here charged is a heinous offence. It comes within the meaning of "embezzlement" mentioned in Sec. 21. Sec. 22 still further enlarges the meaning of the word "heinous," rendering it applicable to all offences which the Government may consider serious. If this is a heinous offence, the earlier provisions of the Act must be complied with. There must be a preliminary inquiry before a Magistrate. [GREEN, J., referred to the provisions of the treaty which provide for the delivery up of the offender *without delay or hesitation*.] That is not inconsistent with my

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argument. If a Government adopts the safeguards which the law provides for the protection of accused persons, it does not thereby lay itself open to the charge of either delay or hesitation. (II.) Even assuming that this case falls within the terms of Sec. 23, and the remaining clauses of the Act have no application to it, either by reason of this not being a heinous offence, or of its being provided for by treaty "in a manner other than that provided by the Act," still I contend that the warrant is invalid, because there has been no preliminary inquiry into the charge contained in the requisition, as provided for in Sec. 23 of the Act. That section says that "it shall be lawful for the Government to adopt such proceedings for carrying the treaty into effect, and for the surrender of such person, *and* for making any preliminary inquiry into the charge contained in the requisition as it shall think fit. The section must be construed strictly *in favorem libertatis*, and, so being construed, a preliminary inquiry would seem to be a condition precedent to the delivery up of a person alleged to be an offender. A section like this is liable to be abused for political purposes, and the court will be careful not to abridge the safeguards introduced for the protection of accused persons. (III.) I contend that Sec. 23 is repealed by the schedule to Act XVII. of 1862.

GREEN, J.:—The prisoner, Rávji bin Keshav, is produced by the Commissioner of Police, in obedience to the writ of *habeas corpus* issued yesterday, and with the prisoner he produces a warrant or order signed by Mr. Wedderburn, one of the Secretaries to the Government of Bombay, under date the 1st of April 1871. This warrant or order, after stating that requisition had been made to the Government of Bombay for the surrender of Rávji bin Keshav, charged with having committed criminal breach of trust in the territory of Barodá, requires the Commissioner of Police, under Sec. 23 of Act VII. of 1854, to cause the said Rávji bin Keshav to be conveyed in custody out of the British territory for the purpose of delivering him to the Resident at Barodá. The section (23) referred to in the order or warrant is as follows:—"If by any treaty Her Majesty or the East India Company shall be

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bound to deliver up to any foreign Prince or State any person liable to be proceeded against by the laws of such foreign Prince or State in any case not expressly provided for by this Act, or in any manner other than that provided by this Act, it shall be lawful for the Government of any part of the territories under the Government of the East India Company in which such person may be found, upon requisition made by or on the part of such foreign Prince or State, to adopt such proceedings for carrying such treaty into effect, and for the surrender of such person, and for making any preliminary inquiry into the charge contained in the requisition as it shall think fit ; and any such order of the Government in writing, under the hand of one of the Secretaries of such Government, shall be a sufficient authority and justification for all acts to be done in execution thereof." Now there is a treaty in force between the British Government and the State of the Gáikvād, made on the 6th of November 1817. By the 9th article of this treaty it is provided that "offenders taking refuge in the jurisdiction of either party" (*i. e.*, the East India Company or His Highness the Gáikvād) "shall be surrendered on demand without delay or hesitation."

It was argued on behalf of the prisoner that Sec. 23 of Act VII. of 1854 had been repealed by the schedule to Act XVII. of 1862. By the latter Act and its schedule "so much of" (Act VII. of 1854) "as relates to warrants issued otherwise than under the provisions of the said Act" is repealed. But I am of opinion that the just-quoted words must be taken to refer to part of Sec. 5 of Act VII. of 1854, and not to Sec. 23, as the only part of the Act which can be said "to relate to warrants issued otherwise than under the provisions of the Act" is to be found in Sec. 5. However this may be, I cannot construe Act XVII. of 1862 as repealing Sec. 23 of Act VII. of 1854. The word "warrant" is not specifically mentioned in that section at all, and if the word "order," such as is provided for in the section, be taken to include a "warrant," then the section provides for the issuing of such order or warrant, and relates to a warrant or order issued under one of the provisions of the Act, and so does not come within the repealing words of the schedule in question.

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Then it was argued that Sec. 23 does not apply to this case, as the offence charged is criminal breach of trust, which, by the conjoint effect of Secs. 21 and 22 of the Act and of the treaty, is a "heinous offence," and, that being so, the proper course was to cause a preliminary inquiry to be held in the manner provided by the earlier sections of the Act, and to follow the course of procedure there pointed out. I do not think it necessary to decide this point, as Sec. 23 applies not only "in cases not expressly provided for by the Act," but also where Her Majesty by any treaty is bound to deliver up any person "in any manner other than that provided by the Act." Now the manner of delivery provided by the treaty which has been referred to is, in my opinion, certainly "other" than the manner which is provided by the Act in the sections preceding Sec. 23, and for that reason I am of opinion that the present is a case to which Sec. 23 is applicable.

It was further argued that, assuming Sec. 23 to apply to the case, it does not make it lawful for Government to deliver up an accused person without preliminary inquiry, as the section clearly contemplates such preliminary inquiry being held. Looking at the wide language of the section in question, I do not feel myself warranted in laying down the rule that such preliminary inquiry as is provided for by the earlier sections of the Act is made imperative, though I think the section does certainly contemplate the holding of some sort of preliminary inquiry, and I should be disposed to consider it an oppressive, and perhaps an illegal, exercise of the power given by Sec. 23 if an accused person were to be delivered up without any preliminary inquiry at all. Had the order or warrant now in question directed the surrender of the prisoner to the officers of the Gáikvād without showing that any preliminary inquiry had been held, I should, I think, have been disposed to order his discharge. But the order or warrant purports to be under the provisions of Sec. 23, and to direct the delivery of the prisoner to an officer of the British Government, namely, the Resident at Barodá, and not to any officer of the Gáikvād's government. The Resi-



dent at Barodá is a Justice of the Peace, besides being an officer of considerable trust and responsibility ; and, having regard to the fact that the order or warrant professes to be under Sec. 23, I ought, I think, to consider that this is a proceeding which the Government, in the exercise of the discretionary power given by Sec. 23, has thought fit to adopt "for carrying the treaty into effect, and for the surrender of the prisoner in question, and for making any preliminary inquiry into the charges contained in the requisition." The crime charged having been committed at Barodá, the facilities for making such preliminary inquiry as is contemplated by the Act must be greater than they would be in Bombay.

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I should add that, in my opinion, it would be desirable in form, when an order is made under Sec. 23, that any warrant or order for conveying any prisoner out of the British territory, except where a preliminary inquiry had been held there, should state the order (if any) for holding such preliminary inquiry at the place to which the prisoner is to be conveyed, and that the warrant or order is made for the purpose of conveying the prisoner to the place where such preliminary inquiry is to be held. The order for the surrender to the foreign power would, of course, be a separate one. For the above reasons, I remand the prisoner, Rávji bin Keshav, to custody.

Attorneys for the accused : *Leathes & Crawford.*

Attorney for F. H. Souter : *R. V. Hearn*, Government Solicitor.



### REG. V. VENKA'JI BHA'SKAR.

April 13.

Mahálkari—*Act XI. of 1843, Sec. 8—Disobedience of Order issued by Mahálkari—Ind. Pen. Code, Sec. 174.*

A Mahálkari invested with the powers of a 2nd Class Subordinate Magistrate cannot issue a summons under Sec. 8 of Act XI. of 1843, nor can a person be convicted under Sec. 174 of the Indian Penal Code for having disobeyed such a summons so issued.

[N this case the accused, Venkáji Bháskar, was convicted by the Second Class Subordinate Magistrate of Dambal,



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in the Dhárwár district, of the offence of intentionally omitting to attend in obedience to a summons under Sec. 174 of the Indian Penal Code, and was fined Rs. 5, which amount the accused paid.

The District Magistrate of Dhárwár (E. P. Robertson), in a letter dated the 17th of March 1871, submitted the proceedings in the case to the High Court for its orders. He observed—

“From the papers it appears that the accused is the Kulkarni of the village of Rati, and he was convicted for non-attendance in obedience to a summons issued by the Subordinate Magistrate in his capacity of a Mahálkari. The summons calls upon the accused to attend to give answer why he had failed to have certain books sealed with the Mahálkari's seal, and thus neglected his duty. The Subordinate Magistrate records his sanction, and tries the case himself. The recorded sanction shows that the Subordinate Magistrate issued the summons under Sec. 8 of Act XI. of 1843 (a). A summons under that section can only be issued by the Collector or controlling officer authorised by Government, with a view to the inquiry to be held under Sec. 7 (b) of the same Act, prior to the dismissal from office of a village officer. The Subordinate Magistrate had no authority to issue such a summons. His proceedings, besides being highly irregular, are illegal.”

PER CURIAM (LLOYD and KEMBALL, JJ.) :—The Court, coinciding in opinion with the Magistrate of the District, annuls the conviction and sentence passed by the Subordinate Magistrate, and directs the fine to be restored.

*Conviction and sentence annulled.*

(a) Section 8 :—“And it is hereby enacted that in conducting the investigation prescribed in the preceding section, the Collector or Controlling Officer shall have the same authority as a Magistrate in compelling the attendance of parties and witnesses, and the production of papers and in taking evidence.”

(b) Section 7 :—“And it is hereby further enacted that the Collector or Controlling Officer, in cases of misconduct or incompetency on the part of an officiating hereditary officer, shall have power to dismiss such officer from his employment; but no such dismissal shall take place except on an investigation recorded in writing, which shall be submitted for the approval and sanction of the Governor in Council.”

## REG. V. DAYA'LJI ENDARJI.

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April 25.

*False Statement—Income Tax Commissioner—Judicial Proceeding—  
—Ind. Pen. Code, Secs. 181 and 193.*

When an offence under Sec. 193 of the Indian Penal Code is established, a conviction under Sec. 181 is illegal.

When the accused made on solemn affirmation a statement before an Income Tax Commissioner which statement the accused knew, or had reason to believe, to be incorrect :

*It was held* that such statement amounted to the offence of giving false evidence in a judicial proceeding, under Sec. 193 of the Indian Penal Code, and was, therefore, not cognisable by a Full Power Magistrate, as it could not be treated as constituting an offence triable under Sec. 181 of the Indian Penal Code (making a false statement to a public servant).

THIS was an application for the exercise of the Court's extraordinary jurisdiction under Sec. 404 of the Code of Criminal Procedure.

The facts were these :—

In an inquiry into the income of one Kuvarji, conducted under the provisions of Act XVI. of 1870, the accused stated on solemn affirmation that Kuvarji himself cultivated certain land situated in the village of Ancheli ; Kuvarji on the same day, and before the same authority, stated that he had sublet a part of the land for Rs. 505 per annum, and was thus liable to the income tax. Mr. Ramsay, Magistrate F. P. in the district of Súrat, tried and convicted the accused on a charge, under Sec. 181 of the Indian Penal Code, of having made a false statement on solemn affirmation to a public servant authorised to administer the same, and sentenced him to rigorous imprisonment for a term of six months, and to pay a fine of Rs. 50, or in default to suffer further rigorous imprisonment for one month.

On appeal made to Mr. Newnham, the Acting Session Judge, the conviction and sentence were upheld.

The application was heard by LLOYD and KEMBALL, JJ.

*Shántárám Náráyan*, for the petitioner :—The offence alleged to have been committed by the accused amounts to the offence of giving false evidence in a proceeding declared by the Income Tax Act to be judicial. The Magistrate F. P. had, therefore, no jurisdiction to try the accused. He

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relied upon *In re the case of Nuthoo Kumall\**; *Reg. v. Shama Churn Roy*, (a) and *Reg. v. Heeramun Singh* (b).

*Dhirajlál Mathurádás* (Government Pleader) relied upon the proceedings of the Madras High Court under date the 4th of November 1868, reported in 4 Mad. H. C. Rep., Appendix xviii.

*Shántáráam* in reply.

PER CURIAM:—Following the ruling of this court in *Reg. v. Nuthoo Kumall*, the Court annuls the conviction and sentence, as the act which the accused is alleged to have committed amounted to the giving of false evidence in a judicial proceeding, an offence punishable under Sec. 193 of the Indian Penal Code, and beyond the jurisdiction of the Magistrate F. P. The fine, if levied, to be restored. The accused having already undergone upwards of four months' rigorous imprisonment, the Court is of opinion that no further proceedings against the accused are necessary.

*Conviction and sentence annulled.*



May 17.

### REG. V. AVJI bin NA'RU *et al.*

*Stamp—Complaint—Seizure of Cattle—Act III. of 1857—Court Fees' Act, VII. of 1870, Sec. 31, and Sch. II., No. 1 (b).*

The illegal seizure and detention of cattle, to which Sec. 14 of Act III. of 1857 refers, is not an "offence" within the meaning of Sec. 31 and Sch. II., No. 1, cl. (b), of the Court Fees' Act, VII. of 1870. Complaints of such illegal seizure and detention do not require a stamp.

If such complaints be stamped, it is not competent for the Court to direct that the accused shall repay the amount of such stamp to the complainant.

THE accused were convicted of "illegal seizure and impounding of cattle," under Sec. 14 of Act III. of 1857, by the Subordinate Magistrate, Second Class, of Waruz, in

(a) 8 Calc. W. Rep., Cr. R. 27. (b) *Ibid.* 30.

\* "A witness who had stated on solemn affirmation that he was not present when the police captured an offender in the act of flight was punished by a Magistrate under Sec. 181 I. P. Code. The High Court annulled the conviction and sentence, on the ground that the act constituted giving false evidence in a judicial proceeding under Sec. 193, and was beyond the Magistrate's jurisdiction:—*In re Nuthoo Kumall*, 8th November 1865."—West's Acts and Regulations, note to Sec. 181 of Act XLV. of 1860.

the Satará district, and were sentenced to a fine of Rs. 3-9-0, to be paid to the complainant. The sentence also directed the accused to repay to the complainant a sum of eight annas, the amount of stamp duty on the complaint.

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The case was noticed on examination of the criminal returns of the Satará Subordinate Magistrates for the month of October 1870. The record and proceedings were called for, for the purpose of considering whether the court fee could be legally directed by the Magistrate to be refunded by the accused to the complainant, the act of the accused not being treated by Act III. of 1857, Sec. 14, as an offence, but rather as an injury for which damages might be awarded.

The case was considered this day by BAYLEY and MELVILL, JJ.

PER CURIAM:—The Court considers that the illegal seizure and detention of cattle, to which Sec. 14 of Act III. of 1857 refers, is not “an offence” within the meaning of Sec. 31, Sch. II., No. 1, cl. (b), of the Court Fees’ Act, 1870.

The word “offence” is expressly used in other sections of Act III. of 1857, but not in Sec. 14. Moreover, Sec. 14 expressly provides that the complaint shall be either verbal or written upon *plain* paper. The words “upon plain paper” are not repealed in Sch. III., Part II., of the Court Fees’ Act, 1870, as the same or similar words standing in other Acts are repealed by that schedule. It seems clear, therefore, that such complaints do not require a stamp, and that the accused should not have been called upon to repay the stamp fee.

*Order accordingly.*

*In the matter of a Prohibitory Notice under Reg. XII. of 1827, Sec. XIX., Cl. 6.*

April 25.

*Notice issued by Magistrate—Prohibition to use level-crossing, provided for particular villages, for general traffic—Reg. XII. of 1827, Sec. XIX., cl. 1 and 6.*

A notice prohibiting general traffic over certain level-crossings on a railway, provided for particular villages, forbidden, as not falling within the scope of Reg. XII. of 1827, Sec. XIX., cl. 1 and 6.

J. E. OLIPHANT, District Magistrate of Puná, under date the 31st of March 1871, issued the following notice:—

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## "NOTICE.

"Whereas information has been received from the Traffic Manager, Great Indian Peninsula Railway, that certain of the level-crossings over the Railway, which are provided *solely* for the accommodation of villages on either side of the line, are used as public thoroughfares by much heavy traffic, which leaves the highroad to Bombay in order to evade the toll-bars ; and whereas the passage of many heavily-laden carts in constant succession over such accommodation crossings is attended with danger to passengers travelling by railway : It is hereby notified that orders have been issued to the gatekeepers at the said accommodation level-crossings, and to the Pátíls of the villages in which they are situated, to prohibit general traffic from passing over them. Any person disobeying this prohibitory order will be punished according to law.

"This injunction is issued under cl. 6, Sec. XIX. of Reg. XII. of 1827."

This notification was submitted to the High Court, for its approval or otherwise, under Reg. XII. of 1827, Sec. XIX., cl. 6.

The notice was considered by LLOYD and KEMBALL, JJ. ;

PER CURIAM :—The notice issued by the District Magistrate under date the 31st of March 1871, not coming within the scope of Reg. XII. of 1827, Sec. XIX., cl. 6, is hereby forbidden, as the Court is of opinion that it does not come within the scope of the law quoted.

April 26.

## REG. V. TA'I, wife of NA'NCHAND.

*Sanction for Prosecution—Specification of Section—Crim. Proc. Code, Sec. 169.*

Sanction for the prosecution of the accused was accorded by an Assistant Session Judge in the following terms :—

"There is no doubt whatever that Táí, Báji, and Bálá, these three persons, made before me certain statements contradictory of the statements which they had made before the committing Magistrate. Therefore, if from such statements of theirs they may be liable to any charge, there is sanction from here" (*i.e.*, I give my sanction) "for their prosecution."

*Held* that this gave sufficient sanction for the prosecution of the accused under Sec. 193 of the Indian Penal Code, and that it is not necessary that the authority giving the sanction should specify the particular section of the Penal Code under which the accused is permitted to be prosecuted.

THE accused was convicted by the Honorable G. A. Hobart, Session Judge of Khándesh, of giving false evi-

dence in a judicial proceeding, and was sentenced to three months' rigorous imprisonment.

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She appealed to the High Court, and, the record and proceedings having been sent for and received, the case was heard before GIBBS and KEMBALL, JJ., who, entertaining doubts as to the sufficiency of the sanction for the prosecution, admitted the accused to bail, and referred the question for the determination of the Full Bench.

On the 26th of April 1871, the question referred was argued before WESTROPP, C.J., GIBBS, MELVILL, and KEMBALL, JJ.

*Shántaráṃ Nárāyaṇ*:—I submit that, in order to give jurisdiction to the trying court, the section of the Indian Penal Code under which it is intended that the accused shall be tried must be specified in the order granting the sanction for prosecution. It has been held by the Calcutta High Court, in *Reg. v. Ooma Moye Debea (a)*, that where a civil court gives sanction to a prosecution under Secs. 169 and 170 of the Code of Criminal Procedure, it should state with precision the particular offence or offences for the prosecution of which it gives sanction. In *Reg. v. Dwarkanath Bose (b)* it was held that a Deputy Magistrate could not commit a person for forgery under Sec. 170 of the Code of Criminal Procedure when the civil court has sanctioned the prisoner's committal under Sec. 169, unless with the express sanction of that court. [WESTROPP, C.J., referred to *Reg. v. Kadir Bux (c)*.] Again, in *Reg. v. Kartick Chunder Holdar (d)*, it was held by Kemp and E. Jackson, JJ., that a general sanction by a Judge to a prosecution for giving false evidence under Sec. 193 of the Penal Code, and for false verification, was not sufficient; and that the exact words upon which the prosecution was based, and the exact offences which the Magistrate was to investigate, should be pointed out. He also cited *Reg. v. Poosa Ram (e)*, *Reg. v. Gobind Chunder (f)*, and *Reg. v. Khushál Hiráman (g)*.

(a) 13 Calc. W. Rep., Cr. R. 25.

(b) 2 *Ibid.* 31.

(c) 11 Calc. W. R., Cr. R. 17.

(d) 9 *Ibid.* 58.

(e) 6 Calc. W. Rep., Cr. R. 11.

(f) 10 *Ibid.* 41.

(g) 4 Bom. H. C. Rep., Cr. Ca. 28.

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*Dhirajlál Mathurádás* (Government Pleader) was not called upon.

WESTROPP, C.J.:—In this case the prisoner Táí is convicted, on the second head of charge, “with having—on or about Ashad Shudh 9th, Shake 1792, being a witness in Case No. 55 of 1870, which was a judicial proceeding then pending before the Assistant Session Judge at or near the town of Dhuliá, and being bound by affirmation according to law to speak the truth—intentionally given false evidence by stating as follows:—‘I stated before the Magistrate that I had seen two women like accused Sálu and Bhágu, not that they were Sálu and Bhágu.’” It is said on behalf of the prisoner Táí that the sanction given for her prosecution by the Assistant Session Judge is insufficient. The order recording the sanction runs thus:—

“There is no doubt whatever that Táí, Báji, and Bálá, these three persons, made certain statements before me contradictory of the statements which they had made in the depositions taken by the committing Magistrate. Therefore, if from such statements of theirs they be liable to any charge against them, there is sanction from here” (i.e., I give my sanction) “for cases being made against them” (i.e., for prosecuting them). “Be this known.

“S. N. TAGORE,

“Assistant Session Judge.”

Now in the first place we may fairly infer, unless the contrary appears, that the Assistant Judge gave sanction for prosecution under some section of the Criminal Procedure Code, which requires that a sanction to prosecute must in certain cases be given; and in the second place, looking to the language of the sanction, we have not any difficulty in ascertaining the section of that Code under which he was acting in giving the sanction.

From what he has said with respect to the contradictory statements, it is evident that he was referring to Sec. 169, and not 170, of that Code. Sec. 170 refers to offences in respect of documents, and there is nothing in the sanction, here given, relating to offences of that nature. Secs. 166 to 168 inclusive are equally inapplicable. If, therefore, any indication as to the section of the Criminal Procedure Code



acted upon in giving the sanction were necessary, there has in this case been a sufficient indication of it. It is unnecessary for us to decide here that such an indication is indispensable. But, howsoever that may be, we do not think that it was intended by the Legislature that the Judge granting the sanction should be bound in all cases to specify the section of the Penal Code under which the trial is to take place. There is not any express provision to that effect in the Criminal Procedure Code, and the Legislature probably intentionally refrained from making such a provision in order to prevent inconvenience. The sanctioning and the committing or trying authorities might differ as to the section of the Penal Code which it would be proper to apply to the case, and the result of an express direction in the Criminal Procedure Code, requiring the sanctioning court to specify the section of the Penal Code, might be a failure of justice. We do not think that we ought to add to the Procedure Code by deciding that the section of the Penal Code must be specified. The sanction given by the Assistant Judge in this case bears some resemblance to the sanction given by the Munsif in the case of *Reg. v. Kadir Bux (ubi supra)*, which sanction was, by L. Jackson and Markby, JJ., deemed sufficient. It was in these words: "The defendant, Kadir Bux Mahomed, gave different statements regarding the same subject-matter in two different cases. His deposition was once given in plaintiff's and at another time in defendant's favour. He has also changed his name from Kadir Bux to Kadir Mahomed to show that he is not the same person. I see no objection to give the petitioner permission to prosecute the defendant criminally for giving false evidence on oath deliberately." In that case L. Jackson and Markby, JJ., declined to adopt the doctrine laid down in *Reg. v. Kartick Chunder Holdar (a)*, which required that the exact words upon which the prosecution is based, and the exact offences which the Magistrate is to investigate, should be specified. We are not disposed to follow the other decisions\* of the Calcutta High Court which

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(a) 9 Calc. W. Rep., Cr. R. 58.

\* 10 Calc. W. Rep., Cr. Rep., 41 ; 13 Calc. W. Rep., Cr. R. 25.



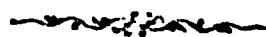
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have been cited to us, and which seem to require a greater amount of particularity in the sanction than we find in the present case. Were we to do so, we think that we should needlessly add to the language of the Legislature, and probably cause many failures of justice. The case of *Reg. v. Khushál Hiráman* (*ubi supra*) differs so much in its facts from this case that we do not offer any opinion upon it.



April 27.

REG. v. SUBI SA'NI.

*Sanction to prosecute—Sections of Code specified—Power of Magistrate to commit under different Sections—Crim. Proc. Code, Sec. 170.*

Where a Civil Court, by letter to a Subordinate Magistrate with committing powers, gave sanction for the prosecution of the accused under Secs. 463 and 471 of the Indian Penal Code (making and using a false document), and where the Magistrate, in committing the accused for trial, in addition to framing a charge under these sections, added a head of charge under Sec. 193 (giving false evidence):

*It was held* that the Magistrate had no jurisdiction to commit the accused for trial on the last-mentioned head of charge.

THIS case was referred for the opinion of the High Court by A. Spens, Acting Session Judge of the District of North Cánará.

The facts of the case are briefly these:—

One Ráchá Sáni adopted the accused Subi, and executed to her a power of attorney, whereby Subi, in consideration of her paying off the debts of Ráchá to the extent of Rs. 250, became owner of Ráchá's estate, moveable and immoveable. One of the creditors of Ráchá, by name Bhistápa, brought a suit against her in the Court of the Principal Sadr Amín of Sirsi for Rs. 100. Subi applied to be made a defendant in that suit, and in support of her application produced the power of attorney above referred to. The Principal Sadr Amín, on inspection of the power, suspected that the figure 250 had been altered to 25. He, accordingly, wrote the following letter to the First Class Subordinate Magistrate of Sirsi:—

“I have sent herewith a copy of my judgment, dated 31st January 1865, passed in Original Suit No 352 of 1863, between Nadigá Bhistápa, alias Goudápá, as plaintiff, and Ráchá Sáni as defendant.

"One Subi applied in the said case to be admitted as a defendant, and in support of the application produced a power of attorney executed in her favour by the aforesaid Ráchá Sáni. In my judgment referred to above, I have expressed my opinion as to its being proved that the amount of the debt, which the applicant was required to pay under the power of attorney, had been originally entered therein as Rs. 250, which seems to have been altered to Rs. 25. From this circumstance I am of opinion that there is ground for the trial of the applicant Subi under Secs. 463 and 471 of the Indian Penal Code.

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"I have, therefore, herewith forwarded to you the records of the said suit, for an inquiry being held in the manner aforesaid.

"The power of attorney in question has been enclosed in a sealed packet and placed on the record of the suit. May this be known.

"T. T. SALDANHA,  
"Principal Sadr Amín."

Upon the authority of this letter, the Subordinate Magistrate of Sirsi committed Subi to take her trial on two heads of charge:—1st, fraudulently using as genuine a forged document, an offence punishable under Sec. 471 of the Indian Penal Code; and 2nd, giving false evidence in a stage of a judicial proceeding, an offence punishable under Sec. 193 of the same Code.

On the trial of Subi, the Session Judge convicted her on the first head of the charge, but acquitted her on the second, on the ground that she had been illegally charged by the committing Magistrate, as the offence alleged to have been committed was one against public justice (Sec. 193 of the Indian Penal Code), and, therefore, could not be entertained without a formal sanction under Sec. 169 of the Code of Criminal Procedure.

In deference, however, to the ruling of the High Court in the matter of the petition of *Jayasing Haribhái*, \* which decided that the Magistrate, to whom the civil court might have sent the accused for commitment, might amend, under Sec. 244 of the Criminal Procedure Code, the special charge specified in the sanction given by such civil court, the Session Judge referred this case for the consideration of the High Court.

The reference was considered by WESTROPP, C.J., and LLOYD, J.

\* See note, *post*, p. 31.

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WESTROPP, C. J.:—We are of opinion that Mr. Spens, the Acting Judge of Cánará, was right in holding that the committing Magistrate in this case had not any authority to commit the accused Subi for trial, on the second charge framed by him against her, under Sec. 193 of the Penal Code, of having intentionally given false evidence in a stage of a judicial proceeding in the Court of the Principal Šadr Amín of Sirsi. The sanction for prosecution given by Mr. Saldanha, the Principal Šadr Amín, was only a sanction to prosecute the said accused Subi under Secs. 463 and 471 of the Penal Code, and being thus expressly limited by mention of those sections, we do not think that the committing Magistrate was entitled to commit her for trial for offences against any other sections of the Penal Code under which the sanction of the Principal Šadr Amín would, under Secs. 168, 169, or 170 of the Criminal Procedure Code, be necessary. This court has not overlooked the case of *Reg. v. Khushál Hiráman and Indragir (a)*. That was a strong decision. But, assuming that it was rightly decided, it is not precisely on all fours with the present case. The sanctioning Judge there, was, so far as the Criminal Procedure Code is concerned, acting under Sec. 169 only, and did not specify any section of that Code, although the application for permission to prosecute did specify Sec. 170. Here, however, the Principal Šadr Amín was acting apparently as well under Sec. 171 as under Sec. 169 of the Criminal Procedure Code, and has specified two sections of the Penal Code (463 and 471) in the letter addressed by him to the First Class Subordinate Magistrate of Táluká Sirsi, by which he sends the case to that Magistrate for investigation. We think that by that letter the investigation was limited to offences against those two sections of the Penal Code, and that we are not at liberty to treat the mention of them as surplusage.

As to the cases cited from the Calcutta Weekly Reporter by the Acting Judge of Cánará, four of them—namely, 8 Calc. W. Rep. 95, 9 Calc. W. Rep. 14, 25, and 54—relate to the

(a) 4 Bom. H. C. Rep., Cr. Ca. 28.

form of charges, and not to the requisite particulars for a sanction to prosecute, and, therefore, are irrelevant. The Legislature has nowhere laid it down that a sanction to prosecute should be framed with as great particularity as is required in a charge. Had it done so, the inevitable result would have been numerous failures of justice, as pointed out in a Full Bench decision made yesterday by four Judges in the case of *Reg. v. Táí. Reg. v. Poosa Ram (b)*, also cited by the Acting Judge, relates to the discretion to be exercised in sanctioning prosecutions, and is, therefore, wholly irrelevant here. *Reg. v. Kartick Chunder Holdar (c)* has been overruled by *Reg. v. Kadir Bux (d)*, in which we concur. *Reg. v. Dwarkanath Bose (e)*, cited by the Acting Judge, is in point here, and was, in our opinion, rightly decided. The case of *Reg. v. Gobur Chunder Ghose (f)* and *Reg. v. Ooma Moye Debee (g)* do not bear upon this case, and, as we think, tend perhaps somewhat too strongly towards requiring an excessive particularity in the form of sanction.

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The direction in the case of *Jayasing Haribháí*, given by the Judges now present, and referred to by the Acting Judge of Cánará in his letter to this court, is not to be considered by him as an authority, that direction having, on reconsideration by the same Judges, been withdrawn.

*Papers to be returned.*

(b) 6 Calc. W. Rep., Cr. R. 11. (c) 9 *Ibid.* 58. (d) 11 *Ibid.* 17.  
(e) 2 *Ibid.* 31. (f) 10 *Ibid.* 41. (g) 13 *Ibid.* 25.

NOTE BY THE REPORTER.—The final order made in the case of *Jayasing Haribháí* was—

“The Session Judge of Ahmedábád is to be informed, with reference to his letter No. 546 of 1869, dated 24th April, that the question of sanction to prosecute having lately come before, and been fully considered by the High Court, it has come to the conclusion that the opinion expressed on its behalf, in its Registrar's letter No. 754 of 1869, dated 19th May, that no new sanction for prosecution in this matter was necessary, and that Mr. Nugent had power to alter or amend the charge under Sec. 244 of the Code of Criminal Procedure, is unsustainable, and that Mr. Nugent's *sherá* of the 24th of November 1868 was right.”

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June 14.

REG. V. VINA'YAK DIVA'KAR.

*Sanction by Local Government—Prosecution of a Judge or Public Servant—Terms of Sanction—Non-compliance with terms of Sanction—Jurisdiction—Crim. Proc. Code, Sec. 167.*

The Local Government in sanctioning or directing (under Sec. 167 of the Criminal Procedure Code) a charge against a public servant of an offence as such public servant has power to limit its sanction, by giving directions as to the person by whom, and the manner in which, the prosecution is to be preferred and conducted ; and a court has no jurisdiction to entertain a charge against such public servant if preferred otherwise than in accordance with such directions.

*Semble.* The Local Government has power in the like case to direct that the accused public servant shall be tried before a specified tribunal, being one having jurisdiction in that behalf.

Therefore, where the sanction directed that the accused public servant should be prosecuted upon such charges as Mr. C. might be prepared to prefer against him, and there was nothing on the record to show, nor did it otherwise appear, that Mr. C. had preferred any charge against, or taken any part in the prosecution of, the accused public servant, the High Court quashed the conviction of the accused, as having been without jurisdiction.

THE accused, Vináyak Divákar, was a District Deputy Magistrate in Khándesh. Upon representations made to the Government of Bombay with reference to his conduct as a public servant, the Government, on the 12th of December 1870, sanctioned his prosecution in the following terms :—“There appears to be sufficient *prima facie* evidence to justify the suspension of the District Deputy Magistrate until he can clear himself of the accusations which have been made against him. The Right Honorable the Governor in Council is, therefore, pleased to direct that Vináyak Divákar be suspended from office, and to sanction, under Sec. 167 of the Criminal Procedure Code, his prosecution, before the Magistrate of the District of Khándesh, on such charges as Mr. Campbell may be prepared to prefer against him. The inquiry should be conducted by Mr. Ashburner in person, and not delegated to any other person, and before the commencement of the proceedings the accused Magistrate should be furnished with copies of the charges, and lists of the witnesses by whom they will be supported, and allowed full opportunity for the preparation of his defence.”

The accused was tried before L. R. Ashburner, District Magistrate of Khándesh, and, on the 30th of January 1871, was convicted of the offence of receiving a gratification other than legal remuneration, under Sec. 161 of the Indian Penal Code, and was sentenced to suffer rigorous imprisonment for a period of six months, and to pay a fine of Rs. 1,000, or in default to undergo rigorous imprisonment for a further period of six months.

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The prosecution was conducted by Káshináth Mahádev Thathe, Mamlatdár of Dhuliá, and Mr. Campbell's name did not appear on the record sent up by the Magistrate, nor did it appear that Mr. Campbell lodged any complaint or took any part in the proceedings. It was stated, however, in the High Court, by counsel for the Crown, that he had been present in court on one or two occasions while the case was proceeding, but this was not admitted on behalf of the accused.

From the above conviction and sentence Vináyak appealed to the Sessions Judge of Khándesh. The Sessions Judge, A. C. Watt, confirmed the conviction and sentence of the District Magistrate.

The High Court, on the application of the accused, sent for the record and proceedings in the case, under the provisions of Sec. 404 of the Code of Criminal Procedure.

The case was argued, on the 14th of June 1871, before WESTROPP, C.J., GIBBS and WEST, JJ.

*Macpherson* (with him *Dhondo Shámráv*), for the prisoner:—There has not been a compliance with the Government Resolution of the 12th of December 1870, which gives sanction to Mr. Campbell to prefer any charges that he may think proper against the prisoner in respect of corrupt practices, for there is nothing in the record to show that Mr. Campbell did prefer any complaint whatever against him. On the contrary, so far as we can judge, he would seem at one time to have made some inquiry and then to have dropped all further proceedings.\* The Mámlatdár it was who

\* NOTE.—One of the witnesses in cross-examination stated that, about three weeks before the trial, he had been taken to a *sáheb*, probably Mr. Campbell.—ED.

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prosecuted. Mr. Campbell does not appear to have taken any part whatever in the case before Mr. Ashburner, the Magistrate of the District. That there may be a limited sanction, under Sec. 167 of the Criminal Procedure Code, appears plain from the words and general scope of that section, and here the sanction is limited to charges to be brought against the prisoner by Mr. Campbell. That limitation was not introduced without good reason. The prisoner was himself a Full Power Magistrate. The Mámlatdár was in a position subordinate to him. [WESTROPP, C. J., as to limiting sanction, referred to *Reg. v. Subi Sáni* (see *antè*, p. 28), and as to sanction generally, to *Reg. v. Táí* (see *antè*, p. 24), and to the Calcutta decisions mentioned in both of those cases.] The case showing that sanction may be limited to a particular section is in favour of my contention.

*Mayhew, contra* :—The main point in the Government Resolution is that the prosecution should be conducted before the Magistrate of the District. The mention of Mr. Campbell may be regarded as surplusage :—*Reg. v. Khushál Hiráman and Indrágir* (a). The gist of the matter as to that part of the Resolution is that Government has sanctioned the prosecution. [WESTROPP, C. J. :—Government has sanctioned a prosecution by Mr. Campbell on such charges as he may bring. There does not appear to be any reason why Government should not be at liberty so to limit its sanction. The record does not seem to show that Mr. Campbell took any part in selecting or bringing the charges. I do not say that he might not have the assistance of a pleader or of counsel. It has lately been decided here \* that Sec. 167 renders the sanction a condition precedent to the entertainment of the charges, and, therefore, that without it the court would not have jurisdiction. Are you instructed that you could show, if this case were referred back to the Magistrate, that Mr. Campbell preferred the complaint or charge in this matter against the accused on which Mr. Ashburner has tried him?] I cannot show that

(a) 4 Bom. II. C. Rep., Cr. Ca. 28.

\* *Reg. v. Parshráam Keshav*, 7 Bom. II. C. Rep., Cr. Ca. 71.



he actually made any charge or complaint, but I am instructed that he was present on one or more occasions during the trial by Mr. Ashburner, and that he (Mr. Campbell) did not object to the proceedings. He should, therefore, be considered as having concurred in them. [West, J.:—The mere accident that he was present on one or more occasions during the trial is not a preferring of a charge by Mr. Campbell.] I am instructed that he never expressed any disapprobation of the proceedings, and I contend that he must be considered as being fully cognisant of them.

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WESTROPP, C. J.:—In this case the question is whether this prosecution is based upon any such sanction as the law requires. It appears that the Bombay Government, on the 12th of December 1870, came to the following resolution (His Lordship read the Resolution.) Now that seems to be a very carefully drawn up and prudent Resolution, if we may be permitted so to say, of the Right Honorable the Governor in Council. That Resolution selects the principal Magistrate of the District as the person before whom the prisoner is to be tried, and also selects Mr. Campbell, a member of the Civil Service, and a Magistrate of full power in that district, as the gentleman who was to bring the charges, and, in fact, amounts to a power to him to select the cases upon which the proceedings should be taken. It is reasonable to suppose that there must have been some special intent on the part of the Government in nominating this gentleman to bring these charges. This was manifestly a case of importance, the prisoner himself being a Full Power Magistrate of considerable standing in the Presidency, and we can very well understand why Government should specially name a gentleman of character and position to select the instances upon which the prosecution should be brought, and to make the complaints before the Magistrate. It could not have been the intention of Government that any official, or other person who so pleased, should be at liberty to bring a charge of corrupt practices against Viuáyak Divákar. It would have been singular if there had been any such intention, and the careful language of this Resolution satisfies us that there



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was not, and that the intention of the Government was that a gentleman of a certain standing should be their delegate to select the cases, if any, upon which the prosecution should be rested. Government was careful that the prisoner should have fair play in this matter; their Resolution provides that the accused Magistrate should be furnished with copies of the charges, and the names of the witnesses who were to be called for the prosecution. We should be laying down more than the law would warrant us if we said that Government has not power, under Sec. 167 of the Criminal Procedure Code, to authorise some one person in particular to bring charges against a public servant. There is nothing in the section to warrant the supposition that Government might not thus limit its sanction, and there might be many cases in which it would be highly reasonable that it should do so. We cannot agree with the argument of Mr. Mayhew that the only important provision in the Government Resolution was as to the tribunal before which the prosecution should be brought. Government may, under the section, have power to limit the sanction to a prosecution before a particular tribunal, provided it be one which has jurisdiction in such a matter. The prosecution has been brought before the tribunal named by Government, so no question arises on that point. But Government has confided the duty of preferring charges to a particular gentleman, which duty cannot be delegated to any one else. We have not, indeed, any attempt on the part of Mr. Campbell to delegate his authority to any one else; and even if he had made that attempt it must have been ineffectual, unless he had special authority to delegate given to him by Government. The general rule of law is *delegatus non potest delegare*. As these charges were not brought by the sole nominee of the Government for that purpose, we think there was no jurisdiction whatsoever on the part of the District Magistrate to entertain the charges. Such is the effect of Sec. 167, and, therefore, the conviction must be quashed. We regret that we are obliged on such a preliminary ground as this to quash this conviction. Nothing could have been more easy than to keep within the limits of

the Resolution; but those limits have been transgressed. It is possible that there has been a failure of justice on this account. We do not go further, however, than to say that it is possible. We must not be understood as in any wise reflecting upon the gentleman who did act for the prosecution and prefer the charges. He may, for aught we know, have been a very proper person to bring them. But he was not the nominee of Government. We, therefore, quash the conviction. The fine, if it has been paid, is to be returned.

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*Conviction and sentence annulled.*



the Resolution; but those limits have been transgressed. It is possible that there has been a failure of justice on this account. We do not go further, however, than to say that it is possible. We must not be understood as in any wise reflecting upon the gentleman who did act for the prosecution and prefer the charges. He may, for aught we know, have been a very proper person to bring them. But he was not the nominee of Government. We, therefore, quash the conviction. The fine, if it has been paid, is to be returned.

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REG. v. RA'VJI valad TA'JU.

June 15.

*False Evidence—Judicial Proceeding—Annulment of Proceedings in Trial in which alleged False Evidence was given.*

The accused was convicted of intentionally giving false evidence in a judicial proceeding, in having, as a witness, therein made, on solemn affirmation, a false statement. The proceedings in the trial at which the alleged false evidence was given were subsequently annulled, in consequence of the sanction for the prosecution being insufficient.

*Held* that the conviction of the accused must be reversed, as the false statement was not made in a stage of a judicial proceeding.

The proceedings in a criminal trial, when necessary to be proved, should be proved by their production.

THE accused was tried by E. T. Candy, Acting Assistant Session Judge at Dhuliá, for intentionally giving false evidence. He was convicted, and was sentenced to one year's rigorous imprisonment and to pay a fine of Rs. 100, or in default of payment to suffer further rigorous imprisonment for three months.

The circumstances out of which this case arose were as follow :—

At the trial of Vináyak Divákar Shárangpáne, Deputy Collector and Magistrate F.P. in Khándesh (for receiving an illegal gratification), held before the District Magistrate, the accused, Rávji, was examined as a witness, and he stated on solemn affirmation that Vináyak Divákar did not on a certain day and at a certain place hold *kacheri*.

This statement the Assistant Session Judge held to be false, and convicted the accused.

The appeal was heard by GIBBS and WEST, JJ.

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*Dhondū Shāmrāv Garud*, for the appellant:—In the case of Vináyak Divákar, out of which this case has arisen, it was held that the sanction to prosecute was restricted to such charges as Mr. Campbell might prefer, and that the prosecution, having been conducted in a manner not warranted by the sanction, was *coram non judice*.\* The proceedings were, accordingly, annulled. Here the statement made by the accused, even assuming it to be false, was made in a case which the Magistrate had no jurisdiction to take cognisance of. The conviction cannot, I submit, be upheld: *Reg. v. Chota Jadabchunder Biswas* (a); Russell on Crimes, Vol. III., p. 6; *Reg. v. Bykunt Nath Banerjee* (b); *Reg. v. Futteali Biswas* (c); Mayne's Indian Penal Code (6th ed.), pp. 144, 145.

*Dhirajlál Mathurádás* (Government Pleader) appeared for the Crown.

PER CURIAM:—On the authority of the cases cited at the bar, and that of *The Queen v. Scotton* (d), there appears to be no doubt that, unless the false statement be proved to have been made in a stage of a judicial proceeding, the conviction cannot be sustained. In this last case Williams, J., said: "It is necessary that the inquiry before the Magistrates should have been a judicial proceeding, in order to assign perjury upon the evidence there given." It has been held by another Division Bench of this court that Mr. Ashburner, the District Magistrate of Khándesh, had no jurisdiction in the case of Vináyak Divákar, out of which this trial arose, as he was not tried on charges preferred by Mr. Campbell, to whom Government limited their sanction, and the entire proceedings were annulled. We must, therefore, reverse the conviction and sentence as being illegal.

We observe that there is another irregularity in the case, which also seems to be a serious one. Strictly speaking, there is no legal evidence of the judicial proceeding in which the alleged false deposition was given; for the principle is

(a) Calc. W. Rep., Special No., Cr. R., 15.

(b) 5 Calc. W. Rep., Cr. R. 72. (c) 10 *Ibid.* 37.

(d) 13 Law J., Mag. Ca., N. S. 58; S. C. 5 Q. B. 493.

\* See preceding case.

that where the law requires a written record to be kept of a trial, that record is the only proper evidence of the proceeding. This being so, parol evidence of such a proceeding is inadmissible (Taylor on Evidence, Sec. 370, p. 399). And that this rule is founded in reason is sufficiently evident from this very case, since, for ought that the witnesses prove, the inquiry in which the impugned statement was made may have been a mere departmental investigation. The Assistant Judge contented himself with the assertion of a Chitnis that the impugned statement was made by the accused on the trial of Vináyak Divákar, and on this has founded a conviction without having the proceedings on that trial before him. We think there should be a uniformity of practice on this important point, and shall, accordingly, consider it in chambers.

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*Conviction and sentence reversed.*

*22/11/197.*

REG. v. YENKU BA'PUJI', KRISHNA bin PA'NDU, and  
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Oct. 4.

*Municipal Commissioners—Subordinate Magistrates—Jurisdiction to try for breach of Municipal Rules—Act XXVI. of 1850—Municipal Rules made ultra vires—Ultra vires doctrine explained.*

Municipal Commissioners appointed under Act XXVI. of 1850 have not, by that Act, conferred upon them, nor are they entitled to assume, judicial powers with reference to breaches of Rules or Bye-laws made by them under that Act.

*Reg. v. Kálidás Keval (a) approved and followed.*

The authority to try offenders against such Rules or Bye-laws is vested in the Magistrates of the country, and Subordinate as well as other Magistrates have jurisdiction to try such offenders.

*Reg. v. Dharmáyá valad Sangápá approved (b).*

Rules made under the above Act which purport to give the Managing Committee of such Municipal Commissioners power to try offenders against such Rules, or to levy fines upon them, are *ultra vires* and illegal.

Rules of the Municipalities of Balsád, Súrat, Malcolm Pet, and Ahmedábád referred to and commented on. How far a rule partially *ultra vires* and partially *intra vires* can be enforced, as to the latter portion, considered.

TWO questions arose in this case: (1) Whether Act XXVI. of 1850 conferred upon Municipal Commissioners of

(a) 5 Bom. H. C. Rep., Cr. Ca. 10.

(b) 8 *Ibid.* 12.

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Mofussil Towns, or entitled them to assume, judicial powers with reference to breaches of Rules or Bye-Laws made by those Commissioners, under that Act; and if not, (2) whether Subordinate as well as other Magistrates had authority to try offenders against those Rules or Bye-Laws.

The above questions were, by KEMBALL, J., referred for the determination of a Full Bench, and were considered by a Court consisting of WESTROPP, C.J., and GIBBS, MELVILL, KEMBALL, and WEST, JJ.

The circumstances under which the questions arose sufficiently appear in the judgment of the Court, which was, on the 4th of October 1871, delivered by

WESTROPP, C. J. :—It appeared, in the District Magistrate's monthly return, for June 1871, of cases tried by Magistrates F. P. in the District of Sátará, that Yenku Bápuji, Krishna bin Pándu, and Tukárám bin Kedári were tried and convicted by J. K. Spence, Magistrate F. P., for "infraction of the Municipal Rules of Malcolm Pet, in that they constructed closed verandahs to their houses without the sanction of the Municipal Commissioners, and encroached on the public roads; Yenku Bápuji and Krishna bin Pándu having previously been made to remove similar verandahs—Sec. 7 of Act XXVI. of 1850"; for which offences Yenku Bápuji was sentenced to pay a fine of Rs. 50, Krishna bin Pándu a fine of Rs. 25, and Tukárám bin Kedári a fine of Rs. 5, under Sec. VII., cl. 5, Act XXVI. of 1850, and cl. 1, Sec. VII. of the Rules of the Municipality of Malcolm Pet. The fines were paid into court, and the accused were thereupon discharged.

Upon that case, as it appeared in the monthly return, the Registrar of the High Court, in the exercise of his duty, made the following remark :—

"The recent ruling of the Court" (*vide* Criminal Referred Cases Nos. 60 and 61 of 1871 from Balsád), "in which it was

held that the enforcement of Act XXVI. of 1850 is a function of the Commissioners appointed under the Act, except as to the levy of rates and penalties, might be communicated to the District Magistrate, with a request that it may be acted on in future in his District, instead of the ruling in *Reg. v. Kálidás Keval*" (c).

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And Mr. Justice Kemball directed that the question should be referred to a Full Bench, there being two rulings apparently opposed to each other.

Since that reference was made, the District Magistrate of Sátará has furnished us with a copy of the Rules of the Municipality of Malcolm Pet, framed under Act XXVI. of 1850. Sec. v., Cl. 3, Art. 4, which enables the Municipal Commissioners to prohibit encroachments on public roads by the building of *oṭlās*, steps, verandahs, &c. jutting out beyond the general line or level, includes within it such an offence as that charged against the three persons accused in the present case. Sec. VII., cl. 1 and 2 (approved by the Governor in Council on the 9th of May 1871), are as follow :—

"Sec. VII., Cl. 1.—Whoever breaks any of the Municipal Rules sanctioned by Government, or disobeys any order made by the Municipal Commissioners under authority of any such Rules, is liable, under Act XXVI. of 1850, on conviction before a Magistrate having jurisdiction, to a fine not exceeding Rs. 50, or, in the case of continuing a nuisance, to a fine not exceeding 5 Rs. for every day that such nuisance is continued.

"Cl. 2.—All such fines shall be leviable by distraint, and be credited to the Municipal Funds."

The words "on conviction before a Magistrate" in cl. 1 clearly show that a trial by a Magistrate, and a conviction by him, are intended by that rule to take place before he issues any warrant to levy.

The principle on which the two Balsád cases (above referred to by the Registrar as Nos. 60 and 61 of 1871) were decided, being, that the Municipal Commissioners alone had, under Act XXVI. of 1850, the right to adjudicate on the liability to penalties and taxes—a decision opposed to that in *Reg. v. Kálidás Keval*, which proceeded upon the opposite



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principle, namely, that the right to adjudicate lay with the magistracy—we think it desirable to consider the grounds of these decisions; and although the present case from Malcolm Pet has not arisen upon any question as to taxes, yet, as the Balsád cases did so arise, we think it may be useful to compare some of the municipal rules of Malcolm Pet, as to taxes, with those of Balsád, Súrat, and Ahmedábád on the same subject. Sec. II., cl. 1, of the Malcolm Pet rules provides what the taxes shall be. Cl. 2, that a bill for them shall be presented to the person liable. Cl. 3, that if the bill be not paid within two days after presentation, the managing committee may cause a notice of demand to be served on the person liable, “and if such person shall not, within twenty days from the service of such notice of demand, pay the sum due, or show sufficient cause for non-payment of the same, such sums, with all costs, may be levied by distress and sale of property under a warrant from the Magistrate, as provided in Sec. 12 of Act XXVI. of 1850.” There is not in that rule (as in the Súrat, Balsád, and Ahmedábád municipal rules), in addition to the taxes and costs to be levied, any penalty leviable for the non-payment of the taxes. Nor is there any mention of a conviction before a Magistrate, or of a summons to be granted by him before he issues his warrant, but there is a declaration that the warrant is to be issued “as provided in Section 12 of Act XXVI. of 1850.” Sec. 10 of that Act might also have been advantageously mentioned in that rule. In considering the Balsád rules we shall deal with the question of the power of the Municipal Commissioners to reserve, for their own adjudication, alleged breaches of the rules to pay municipal taxes. However, so far as regards the above cl. 3 of Sec. II. of the Malcolm Pet rules, even assuming that the Commissioners intended by it to reserve to themselves such right to adjudicate, their subsequently made rule, Sec. VII., cl. 1, already quoted, makes no exception of breaches of cl. 3, Sec. II., and has the effect of qualifying that rule, and of—properly, as we think—subjecting breaches of it, as well as of any other of the municipal rules of Malcolm Pet, to the adjudication of the magistracy only.

In the two Balsád cases mentioned in the note made by the Registrar (No. 60 of 1871, *Reg. v. Báburáv Bhiklo*, and No. 61 of 1871, *Reg. v. Lakhmá Bhagván and Dhádko Bhiklo*), the accused persons respectively had been tried and convicted by a First Class Subordinate Magistrate of Balsád for breaches of Rule 29 of the Municipal Rules of Balsád in attempting to evade payment of municipal taxes, and were respectively fined one rupee.

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Rules 28 and 29 of the Balsád Municipality are precisely the same as Rules 28 and 29 of the Súrat Municipality, and are as follow:—

“28. If any person refuses to pay any tax legally due, the tax collector may detain a portion of his goods or property sufficient to cover the amount, provided that immediate application for process under Sec. 10 of Act XXVI. of 1850 be made through the Secretary [of the Municipality] to a Magistrate having jurisdiction.

“29. Any person convicted of evading, or attempting to evade, payment of taxes, shall be liable to a penalty not exceeding Rs. 50 in addition to the amount of the tax due from him. The Managing Committee shall impose the penalty at their discretion, after due investigation, and shall apply, through their Secretary, to a Magistrate having jurisdiction, for its enforcement, under Sec. 10 of Act XXVI. of 1850. They may award to the informer a portion of the penalty not exceeding one-third.”

Those Rules 28 and 29 were, as regards Balsád, sanctioned by Government on the 19th of September 1867, and as regards Súrat on the 11th of April 1867.

Rule 28, so far as it purports to authorise the detention of goods or property by the tax collector, cannot be regarded as valid, it being in excess of the remedies for the recovery of taxes prescribed in Act XXVI. of 1850, Secs. 10 and 12. The effect of inconsistency between bye-laws, and the Act or Charter which empowers a company, corporation, or other public body to make bye-laws, shall be discussed presently.

Amended Rule 55 of the Balsád Municipal Rules was, on the 9th of May 1871, sanctioned by Government in lieu of the original rule bearing the same number. That amended Rule 55 is as follows:—“Whoever breaks any of the Municipal Rules sanctioned by Government, or disobeys any order made by the Municipal Commissioners under the authority of

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any such rule, is liable, under Act XXVI. of 1850, on conviction before a Magistrate having jurisdiction, to a fine not exceeding Rs. 50, or, in the case of continuing a nuisance, to a fine not exceeding Rs. 5 for every day that such nuisance is continued. All such fines are leviable by distraint under the provisions of the aforesaid Act XXVI. of 1850, and on realisation shall be credited to the Municipality."

That rule contains no exception of breaches of Rule 29, but, on the contrary, omits an exception, which would have included Rule 29, and was contained in the original Rule 55 of the Balsád Rules. That original Rule 55 was precisely the same as Rule 55 of the Súrat Rules. The careful omission of this exception in the amended Rule 55 of the Balsád Rules, and the general scope of that rule, must be considered as rescinding so much of Rule 29 as affects to reserve to the managing committee of the municipality of Balsád the right of adjudication upon such breaches. The words "on conviction before a Magistrate," in that amended Rule 55, show that a trial by a Magistrate is contemplated.

Whether Rule 29, unqualified by the amended Rule 55, was a valid rule as it originally stood in the Balsád Rules, and apparently still stands in the Súrat Rules, shall be presently considered.

Rule 55 of the Súrat Rules, as it stands in our copy, is as follows :—

"55. Any disobedience of the orders of the Municipality under the foregoing Rules shall, *unless otherwise specially provided therein*, be punished, on conviction before any Magistrate, by a fine not exceeding Rs. 50, as provided in Act XXVI. of 1850, and in case of continued disobedience by a fine not exceeding Rs. 5 for every day during which such disobedience shall be wilfully continued. All such fines shall be levied as provided in Act II. of 1839, and shall be credited to the Municipal Funds."

The words "unless otherwise specially provided therein" have the effect of leaving Rule 29 of the Súrat Rules unaffected by this rule (55). Whether Rule 29 can be maintained, remains, as already mentioned, for further consideration.

In the Rules of the Ahmedábád Municipality we find the following rule in Ch. II., relating to Taxes :—

"XVII. Any person or persons convicted of evading, or attempting to evade, payment of dues authorised to be levied in the city and suburbs of Ahmedábád, shall be liable to a penalty not exceeding fifty rupees, in addition to the tax leviable according to the Schedule in Appendix B. All such fines shall be levied by distraint by the Managing Committee, and credited to the Municipal Fund, and the Managing Committee may, at their discretion, reward the informer with any sum not exceeding one-third of the amount of the fine imposed."

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So far, at least, as that rule purports to empower the managing committee themselves to levy fines, it is clearly *ultra vires* and illegal, inasmuch as Act XXVI. of 1850 in express words gives that power to a Magistrate. However, in Ch. VIII., headed "Penalties for infraction of Municipal Rules," are two rules, 52 and 53, which, in the copy of the Ahmedábád Rules now before us, appear to have been subsequently inserted, and inasmuch as there is no saving in Rule 52 of the breaches of the rules for payment of taxes, that rule (52) would appear to rescind so much of Rule 17 as can be regarded as empowering the managing committee either to adjudicate upon such breaches, or to levy penalties, and seems rightly to leave those duties to a Magistrate.

Rule LII. is—"Whoever breaks any of the Municipal Rules sanctioned by Government, or disobeys any order made by the Municipal Commissioners under the authority of any such rule, is liable, under Act XXVI. of 1850, on conviction before a Magistrate having jurisdiction, to a fine not exceeding fifty rupees, and in the case of continuing a nuisance to a fine not exceeding five rupees for every day that such nuisance is continued." That rule properly contemplates a trial by a Magistrate.

Rule LIII. is—"All such fines are leviable by distraint under the provisions of the aforesaid Act XXVI. of 1850, and, on realisation, shall be credited to the Municipality."

The District Magistrate, Mr. Hope, referred the two Balsád cases, Nos. 60 and 61 of 1871, above mentioned, to the High Court, under Sec. 434 of the Criminal Procedure Code, as convictions which were illegal, because, he said, the Subordinate Magistrate had no jurisdiction to try the case under the said 29th rule, which restricts the power of inflicting

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finer to the managing committee, and leaves the enforcement of them only to the Magistrate. And, upon that ground, two of the Judges, who have considered the present case, annulled the convictions, but their attention had not been called to *Reg. v. Kálidás Keval*, nor was the amended Rule 55 (which I have stated to have been lately introduced into the Balsád Rules, and as apparently having had the effect of rescinding so much of Rule 29 as purported to reserve to the managing committee any right to adjudicate upon alleged breaches of that rule by evasion or attempts to evade the payment of municipal taxes) submitted to them.

The Registrar having suggested, as a consequence flowing from the ruling in the two Balsád cases, that in the present (Malcolm Pet.) case the right of adjudication lay with the Municipality, and not with the Magistrate, and that only the ministerial duty of levying such penalty as the Municipality might impose, in the event of a breach of the municipal rules, was intrusted to a Magistrate, and my brother Kemball having referred that question to a Full Bench as the subject of conflicting decisions of Division Courts, it has been considered by my brothers Gibbs, Melvill, Kemball, and West, and myself.

*Reg v. Kálidás Keval* was decided by Couch, C. J., and Newton, J., after their attention had been fully directed to Act XXVI. of 1850. They annulled the conviction and sentence in the case, which had been tried and disposed of by the managing committee of the Ahmedábád municipal commission, on the ground that the committee had not any power by law to try and convict the accused person (*Kálidás Keval*) of the offence (committing a nuisance), inasmuch as "Secs. 6 and 7 of Act XXVI. of 1850 do not authorise the giving to the managing committee the power of adjudicating in case of alleged breach of any rules therein referred to, and Sec. 10 of the same Act has provided for the recovery of fines by Magistrates."

There certainly is not any judicial authority, or power (by making rules to that effect) to assume any judicial authority, conferred in express terms, by Secs. 6 and 7 of Act XXVI.

of 1850, upon the Municipal Commissioners. The only mode by which the bestowal of such an authority upon the Municipal Commissioners could be contended for in argument, would be by construing Sec. 10 as not conferring any judicial authority upon the Magistrates, and as limiting their functions under the Act to the ministerial process of levying the taxes and penalties mentioned in that section, and by holding that such a limitation rendered it necessary to imply, from the somewhat vague language of Secs. 6 and 7, that the right to try persons charged with breaches of the rules, which those sections in express terms empower the Municipal Commissioners to make, is, by those sections, vested in the Municipal Commissioners.

By Sec. 6 it appears that the Commissioners (including the Magistrate) are appointed "for putting the Act in force," and are given authority "to prepare rules for more effectually accomplishing the purposes for which they are appointed, *which rules, when approved by the Governor, or Governor in Council, &c., shall be of the same force within the said town or suburb, until altered or rescinded, as hereinafter provided, as if they were inserted in this Act.*"

Whether that power of making rules, although extensive, would warrant the making of rules wholly unreasonable in themselves, is perhaps doubtful. It certainly would not warrant the making of rules inconsistent with the Act. Ordinarily a corporation or company, whether authorised by prescription, or by charter or statute, to make rules, or, as they are more frequently styled, bye-laws, cannot make any valid rules which are unreasonable in themselves: 2 Com. Dig. "Bye-law," (B. 1) (C. 6, 7); 8 Rep. 126; 11 *Ibid.* 54 b; *Elwood v. Bullock* (b). Whether a rule made under Act XXVI. of 1850 would be void on the ground of unreasonableness only, it is unnecessary for us now to decide. But it is certain that a corporation, or company, or other public body, whether created by Act of Parliament or by Charter, has not any power of making bye-laws beyond what is clearly given to it by the Act or Charter: *Kirk v.*

(b) 6 Q. B. 383.

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*Nowill* (c); *Rex v. Spencer* (d); *Rex v. Cutbush* (e); *Rex v. Breton* (f); *Dunston v. Imperial Gas Company* (g); *Reg. v. Wood* (h); *Dearden v. Townsend* (i); *Waite v. Local Board of Health* (j); and such rules or bye-laws, if inconsistent with the provisions, either express or implied, of the Charter or Statute, would be void as being *ultra vires*, although sanctioned by the Executive Government. In *Elwood v. Bullock* (k), a bye-law, which was deemed to be wholly unreasonable, was, by the Court of Queen's Bench in 1844, held to be void, although duly published and notified to a Secretary of State under the Stat. 5 & 6 Wm. IV., c. 76, s. 90, and not disallowed by him. The bye-law had been made by the corporation of Bury St. Edmunds, by virtue of a charter and of the said statute, of which the 90th section empowered that corporation (amongst others) to make bye-laws for the good rule and government of the borough, and for the prevention of nuisances, and to appoint fines, and provided "that no such bye-law shall be of any force until the expiration of forty days after the same, or a copy thereof, shall have been sent, sealed with the seal of the said borough, to one of His Majesty's Principal Secretaries of State, and shall have been affixed on the outer door of the Town Hall or," &c.; "and if, at any time within the said period of forty days, His Majesty, with the advice of his Council, shall disallow the same bye-law, or any part thereof, such bye-law, or the part thereof disallowed, shall not come into operation;" and Sec. 91 enacted "that all the provisions hereinafter contained relative to offences against this Act, punishable upon summary conviction, shall be taken to apply to all offences committed in breach of any bye-law or regulation, made by virtue of this Act." On this point of sanction, *The Stationers' Company v. Salisbury* (l) may be

(c) 1 T. R. 118, 124. (d) 3 Burr. 1827, 1837, 1838, 1839.

(e) 4 Burr. 2204, 2207, 2208. (f) *Ibid.* 2260, 2267.

(g) 3 B. &amp; Ad. 125.

(h) 5 El. & Bl. 49 S. C. nom. *Reg. v. Rose*; 1 Jur., N. S., 802; 24 L. J. M. C. 130.

(i) L. R. 1, Q. B. 10.

(j) L. R. 3, Q. B. 5.

(k) 6 Q. B. 383.

(l) *Comberbach* 221.



advantageously referred to. I shall presently advert more fully to that case.

As an unmistakeable instance in which a rule or bye-law, purporting to be made under Act XXVI. of 1850, would be *ultra vires*, let us suppose a rule that any person throwing rubbish into the streets should be fined Rs. 100 ; that would be opposed to Sec. VII., cl. 5, which limits the highest allowable range of the penalty to Rs. 50, and would, therefore, be a void rule. The degree of repugnance could not alter the case ; provided the rule were repugnant to the Act to any extent, the rule would, to that extent at least, be void, and, as we shall presently show, if indivisible, would be totally void.

Sec. 7 of Act XXVI. of 1850 enacts that "The Rules to be prepared by the said Commissioners shall provide, among other things, for those following, that is to say." Then follow five subjects as to which rules should be made : the 1st relating to the appointment of officers, &c. ; the 2nd to the raising of money by taxation for the purposes of the Act, and its due application when raised ; 3rdly, "the manner in which from time to time the Rules in force are to be amended or rescinded, and new rules are to be made, with the approval, in every case, of the Governor, or Governor in Council," &c. 4thly—"The definition and prohibition of nuisances within the town or suburb." 5thly—"The imposition of reasonable penalties for breach of any rule made by the Commissioners, not exceeding fifty rupees, or, in the case of continuing nuisance, not exceeding five rupees for every day that such nuisance is continued."

The contention against the Municipality on the present question would be, that *primâ facie* the 5th clause of Sec. VII. means, not that the Commissioners should adjudicate whether or not any particular individual had violated their rules, but should fix (within certain specified limits) reasonable penalties to be inflicted generally for breaches of their rules, or for continuing nuisances, according to the gravity of such breaches or continuing nuisances respectively.

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Thus, it would seem that the power to make rules for the imposition of such penalties is, when standing by itself, merely a power to make a general tariff of penalties for breaches of the bye-laws, and not a power to adjudicate, or even to determine who shall adjudicate, that any person in particular has committed such a breach. Most probably the learned Judges who decided *Reg. v. Kálidás Keval* were of opinion that if the Legislature intended to confer a judicial power upon the Municipal Commissioners, it should have done so in clear terms, and not left such an intention to be laboriously spelt out of the various parts of the Act. For ordinarily, and in the absence of any special remedy given by the Act or Charter constituting the corporation, or board, or company, or of a prescriptive authority in the corporation, the only remedy whereby a penalty affixed to a breach of a bye-law can be recovered is by action of debt; and it may not be levied by imprisonment, or distress and sale: Com. Dig., Bye-law (D. 1), (D. 2), (E. 1), (E. 2); 8 Rep. 127 *b*; 1 Rolle Ab. 367 (5); *Adley v. Reeves* (*m*), where Lord Ellenborough, C. J., says: "A bye-law giving a remedy by distress for the recovery of the penalty would be bad;" and again: "It is true, undoubtedly, that if the law give a power of inflicting a penalty, where it gives the end, it also gives the means of attaining it by *action*, but it does not give any extraordinary means;" and, speaking of the bye-law in that case, he said: "It certainly is a bye-law not authorised by any usage stated in the case." Le Blanc, J., said: "If the usage only authorises the infliction of a penalty and stops there, I am not aware of any case which shows that a bye-law may go further than the common-law mode of recovering it by action." Hence it was that, in order to give a more summary and less expensive mode than a civil action for the recovery, as well of taxes, as of penalties in respect of breaches of the rules or bye-laws to be made by the Municipal Commissioners under Act XXVI. of 1850, some such enactment as its 10th section became

(*m*) 2 M. & S. 53, 60, 61. See also, as to action of debt for a penalty under a bye-law, 1 Bos. & P. 89, 98; 2 Wils. R. 266; 3 *Ibid.* 155; Willes R. 384.

necessary. That section is as follows :—“ 10. The powers of Act II. of 1839 for the recovery of fines shall be applied for the recovery of all arrears of taxes and penalties under this Act; and every Magistrate shall put in force the powers of the said Act II. of 1839 for that purpose, whenever thereunto required by the Commissioners, or any of their officers deputed by them, for the purposes of enforcing payment of arrears of taxes imposed under this Act.” Act II. of 1839, which has been repealed by Act XVII. of 1862, but still subsists for the purposes of Act XXVI. of 1850 (n), enacted (Sec. 1) that “ in all cases of fines by which offenders are or may be punishable by any Magistrate, according to the provisions of any Act heretofore passed, *or which shall hereafter be passed, by the Governor General of India in Council*, it shall be lawful, in case of non-payment, if no other means for enforcing the payment are or shall be provided, for the Magistrate, by warrant under his hand, to levy the amount of such fine by distress and sale of the goods and chattels of the offender which may be found within his jurisdiction,” and, in default of such property, by imprisonment. And the 3rd section enacted “ that in all cases in which offenders are or may be punishable by fine before a Magistrate according to the provisions of any Act heretofore passed, *or which shall hereafter be passed, by the Governor General of India in Council*, it shall be lawful for the Magistrate, *and he is hereby required*, to receive proof of the commission of the offence upon oath, or upon solemn affirmation in cases where a solemn affirmation is receivable by law instead of an oath,” the glossarial section (4) defining the terms “ fine ” and “ fines ” as including all “ penalties ” and “ forfeitures.” It is clear that, so far as Act II. of 1839 is concerned, the hearing and conviction by the Magistrate were to precede the fine. But the contention for the municipality would be that Sec. 10 of Act XXVI. of 1850 adopts only so much of Act II. of 1839 as is ministerial, namely, the issuing of the warrant of distress and sale, or of imprisonment in default of goods and

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(n) So decided *in re Motee Gokal*, 3rd October 1866—*vide* 1 West's Acts, note on Sec. 10 of Act XXVI. of 1850.

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chattels ; and that the powers of Act II. of 1839 for the *recovery* of fines shall be applied for the *recovery* of all arrears of taxes and penalties “under Act XXVI. of 1850,” shows that this is the right construction, as well by the use of the word *recovery* as by coupling “taxes” with “penalties”—an argument which, it may be said, is fortified by the further direction that the Magistrate shall put in force the powers of Act II. of 1839 “for that purpose,” namely, the recovery of all arrears of taxes and penalties, “whenever thereunto required by the Commissioners, or any of their officers deputed by them for the purposes of enforcing payment of arrears of taxes imposed under this Act” (XXVI. of 1850). But as to this last argument it should be observed that the words “whenever thereunto required by the Commissioners or their officers,” &c., must not be taken in a sense too large, or opposed to common right. We should hesitate to assert that they mean more than “whenever thereunto lawfully and properly required by,” &c. It is difficult to see why, if the Municipality was intrusted by the Legislature with the power of adjudication, it should not have been likewise intrusted with authority to carry into effect its decisions, or why the cumbrous process of sending the Commissioners or their officers to a Magistrate for his warrant, as to the issuing of which he would be a mere automaton, should have been resorted to. Why should the intervention of the Magistrate be required, if he were to be powerless to check illegality or oppression, or to inquire into the justice of the demand for taxes or the liability to penalties, and if the right to adjudicate upon both were to be surrendered to the interested Municipality? Admitting in these respects the supremacy of the Legislature (1 Kent Com. 502, 10th ed.), yet such an intention it seems unreasonable, without clear, unambiguous, and convincing language on its part, to attribute to it, and it would be most unusual for any Legislature to adopt such a course, and for courts of justice to assume that it intended to do so. The authorities to which we shall next advert show how persistently courts of justice have shunned any such assumption, even as regards the levy of taxes, and that *à fortiori* have they done so as regards the levy of penai-

ties. Those decisions are founded not upon any technical doctrine connected with ancient corporations, but upon two general rules, old indeed, but which we hope may never become obsolete in British territory, either in the East or in the West, namely, (1) that no man nor body politic shall be the judge in his or their own cause, and (2) that no man shall suffer either in purse or person without an opportunity of being heard.

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It should be noted that Secs. 10 and 12 of Act XXVI. of 1850 do not contain any prohibition to the Magistrate's proceeding in the usual way before granting a warrant of distress; and the existence of such a provision as that in Sec. 3 of Act II. of 1839, which expressly requires a Magistrate, acting under that and subsequent Acts, to investigate cases before he grants warrants, doubled the necessity on the part of the Legislature to speak explicitly in Act XXVI. of 1850 when referring in it for the powers of the Magistrate to Act II. of 1839, if intending to discard a provision so important and so just as Sec. 3.

Independently even of express legislation to that effect, it is a general rule of English law that where a Magistrate grants a warrant in the nature of execution, he is bound first to summon and hear the party against whom it is sought, unless the statute, under which he acts, renders it perfectly clear that his function is ministerial only, or in some other manner dispenses with the summons and hearing.

In *Rex v. Benn* (o), which was an application for a mandamus against two justices of the peace for the county of Cumberland, to compel them to grant warrants of distress to levy poor-rate, which the justices refused to grant, because no previous summonses had been sued out from them, the Court of King's Bench refused to grant any *such* mandamus. Lord Kenyon, C.J., said: "The payment of the poor-rate, unless it be set aside, must be enforced; and if the magistrates will not issue a summons to the person who refuses to pay the rate, this court will grant a mandamus to compel them to do it; but a summons must precede a warrant of distress,

(o) 6 T. R. 198.

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which is in the nature of an execution. On the summons, the party may show a sufficient reason to the magistrates why the warrant should not issue, as for instance that he had already paid the assessment to one of the parish officers, who has not accounted for it. But it is an invariable maxim in our law that no man shall be punished before he has had an opportunity of being heard : whereas if a warrant of distress were to be issued without any previous summons, the party would have no opportunity of showing cause why the execution should not issue against him." And in *Harper v. Carr* (*p*), (which was an action of trespass against a churchwarden for taking the anchor of a ship as a distress for non-payment of a poor-rate under a warrant of magistrates, and in which action it was held that the magistrates ought to be co-defendants with the churchwarden, and that the granting of their warrant was a judicial, and not a ministerial act), Lord Kenyon, C. J., in referring to an argument at the bar that justices of the peace act ministerially in granting a warrant of distress for *non-payment* of a poor-rate, in the same manner as when they *allow* a rate, said (*q*) : "I think that the case of allowing a poor-rate is the single instance in which the justices act ministerially ; but there the allowance alone does not put the rate into a state to be enforced, for it is still open to an appeal by any person who thinks himself aggrieved. But in the instance of granting a warrant of distress, the justices exercise a discretion, after inquiring into the circumstances of the case. It is an essential rule in the administration of justice, that no man shall be punished without being heard in his defence ; the party must be summoned before a warrant of distress is granted, as we decided in *Rex v. Benn* ; and on that summons many circumstances may appear to show that a warrant of distress ought not to be granted." In *Rex v. Hughes and others* (justices of the borough of Stafford), Patteson, J., said (*r*) : "How does this case differ from that of a distress for a poor-rate ? There the justices have nothing to do with making the rate, and

(*p*) 7 T. R. 270, 275.      (*q*) *Ibid.* p. 275.      (*r*) 3 Ad. & E. 430.

no control over it; and the clause in Statute 43 Eliz., c. 2, s. 4,\* empowering them to distrain, makes no mention of a summons. Yet it has been repeatedly held that a summons must issue before the warrant of distress for a poor-rate." Counsel replied: "Here a tribunal (that of the commissioners) is expressly constituted for the purpose of hearing any complaint against the assessment." Patteson, J.: "In the other case (that of poor-rate) the sessions are such a tribunal." Counsel: "Here the enactments are such that the commissioners and magistrates form as it were branches of one court. The magistrates have no discretionary power as to granting a warrant. The Act, indeed, would be nugatory if they might take the rate into consideration when called upon to grant a warrant." Patteson, J.: "The defendant might insist on many things independent of the propriety of the rate; for instance, that it had never been demanded of him." That dialogue in *Rex v. Hughes* bears very strongly upon the present case. *Rex v. Hughes* (s) arose upon a local Act of Parliament empowering commissioners to make paving and lighting rates, and to hear and relieve parties complaining of such rates. The Act also gave an appeal from the commissioners to the sessions. And it provided that on non-payment of rates for seven days after personal demand, it should be lawful for certain justices, upon *proof on oath* of such demand and non-payment, to issue a distress warrant. The justices being applied to for such a warrant on sworn information, stating the making of the rate, and that it was demanded and not paid, refused to grant the warrant without having the alleged defaulter summoned before them. The court refused a mandamus to compel the justices to issue a warrant without summoning the alleged defaulter, and further held that even if the Act authorised the

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\* The words of that enactment are: "It shall be lawful, as well for the present as subsequent churchwardens and overseers, or any of them, by warrant from any two such justices of the peace as aforesaid, to levy as well the said sums of money, and all arrearages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods," &c. Then followed a power to commit in default of distress.

(s) 3 Ad. & E. 425.

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*justices to grant a warrant without summons, they nevertheless acted rightly in not so granting it.* Lord Denman, C.J., in that case, after referring to the ruling on the Stat. 43 Eliz., c. 2, that a summons must issue before warrant of distress for poor-rate, said: "Why should we suppose that the Legislature intended any different mode of proceeding under the present Act. Nothing can be more unreasonable than the course here proposed; *and unless it were expressly directed by Act of Parliament*, I should think that magistrates ought not to proceed to the arbitrary act of issuing a warrant without calling upon the party to show whether he had, or had not, in fact, paid the rate, or why it had not been paid. In my opinion, the magistrates in the case have done themselves honour by refusing so to proceed." Littledale, J., and Williams, J., concurred, as did also Patterson, J., who in giving his judgment said: "It is not necessary to the construction we are giving the statute to say that the justices are invested with a power over the rate; nor are they. The whole object of the summons would be, that the party might be heard to show cause why he should not pay the rate. *At all events the Act does not compel the justices to issue a warrant without calling the party before them.*" A still stronger case than *Rex v. Hughes* is that of *Painter v. The Liverpool Gas Company* (t). The statute establishing the defendants' company enacted that if any person should refuse or neglect, for ten days after demand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company or their clerk, by warrant of any justice of the peace for the town, &c., and it should be lawful for the company, or their clerk, or any person acting under their authority, with such warrant, to levy the sum so due by distress and sale of the goods of the party so neglecting or refusing to pay, or the same might be recovered by action," &c. In an action of trover brought against the company by a party distrained upon, it was held that a warrant so issued by a justice, without previously summoning and hearing the party to be distrained

(t) 3 Ad. & E. 433.



upon, was illegal, though a summons and hearing were not in terms required by the Act. The company endeavoured to justify under that warrant, and stated that it was issued upon the complaint of their collector, and that he, by virtue of it, and under their authority, seized the plaintiff's goods for the purpose of levying a sum owing by him to them, and duly demanded according to the Act. The court, however, held that the warrant, although it would have protected the clerk or an officer, was no justification to the company, they not having acted in obedience to it, but put it in force as parties. The court then expressed their approbation of the doctrine of Lord Kenyon, C.J., in *Rex v. Benn and Harper v. Carr*. Littledale, J., in particular, said: "The warrant here is in the nature of an execution; and both upon the principle stated in *Rex v. Benn*, and in common justice, such process ought not to issue without a hearing of the party:" and Williams, J.: "I never heard the proposition doubted that a party is not to suffer in person or in purse without an opportunity of being heard."

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In the Rules of all four of the municipalities (Balsád, Súrat, Malcolm Pet, and Ahmedábád), the fines are directed to be credited to those municipalities respectively. In adjudicating upon the liability of particular individuals to those fines, as well as to the taxes, those municipalities would be adjudicating in their own cause. How completely hostile the law is to allowing a municipality to decide upon questions in which it is interested, is shown by *Hesketh v. Braddock* (v), in which a bye-law of the corporation of Chester that none but freemen of the city of Chester shall keep shop within it, and which confined the action of debt, to be brought by the city treasurer for recovery of the penalty, to the Portmote Court, where none but the sheriff or coroner (who must be freemen) can array a jury, was held to be a void bye-law. Lord Mansfield said: "The minuteness of the interest won't relax the objection. For the degrees of influence can't be measured; no line can be drawn, but that of a total exclusion of all degrees whatsoever."

(u) 3 Burr. 1847.



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The principle which prevailed in that case was also laid down in the strongest possible manner in *Day v. Savadge* (v); and see 1 Rolle Ab. 367, pl. 7. The case of *The Stationers' Company v. Salisbury* (w) was an action of debt for a penalty upon a bye-law of the company "that the master, wardens, and assistants, or major part of them, should from time to time elect such members as they think fit into the livery, and if any person so elected refuse to accept the same office, &c. without a reasonable excuse, to be approved by the court of assistants, that the person so refusing should forfeit £40." The declaration recited the bye-law, averred the election of the defendant by the livery, his refusal to accept the office, *per quod actio accrevit*, &c., and that he had no reasonable excuse. The defendant demurred, because, as was argued for him by Northey, (1) the bye-law was bad, as making the company the judges of the reasonableness of the excuse; for which he cited 1 Rolle Ab. 364, pl. 7; and *Dr. Bonham's Case* (x). (2) Even if the bye-law were good, there was no good breach of it assigned, as it was not shown that he had been summoned by the company to show cause why the penalty should not be inflicted. Sir Bartholomew Shower, for the company, argued (*inter alia*) that, the defendant having demurred, the averment, that he had no reasonable excuse, must be taken to be true, and that the bye-law was good. Holt, C. J., said: "Here the cause of excuse is to be approved by them (the court of assistants), so that if it were reasonable and not approved, the party would be without remedy; and we cannot here reject that part; where a parcel of bye-laws come before us together, some good and some bad, they may be severed; but not so where the sense is entire, as in this case." Sir B. Shower: "Suppose it were, upon due proof, to be allowed by a certain officer, sure that were good." Holt, C. J.: "I doubt

(v) Hob. R. 85, 87.

(w) *Comberbach* 221.—See also *Clarke v. Tucket*, 2 Ventris 182; S. C. 3 Levinz 281.

(x) 8 Rep. 114 a; and see Fraser's note (c) at p. 118 a (375).

that." Sir B. Shower: "This bye-law was signed by the Lord Chancellor Finch." Per Curiam: "'Tis never the better for that, for that is done of course. So we used to do in the Circuits (y); but if the orders (bye-laws) be not good, let the parties look to that at their peril." The Reporter mentions that "the court inclined for the defendant" upon both points, but recommended a reference of the dispute to the Lord Mayor.

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We are not aware that there is any good reason for expecting a greater degree of impartiality from a Mofussil Municipality than from an English Municipality or other public body, so as to warrant any supposition that the Indian Legislature intended to lay down a rule for India different from that which prevails in England.

Of the numerous instances in which the same rule has been applied to individuals, and that neither the Judge himself may decide his own cause nor even his deputy, it is sufficient to refer to *Dimes v. The Grand Junction Canal* (z), where a decision of Lord Chancellor Cottenham was set aside on the ground that he was interested; and to *The City of London v. Wood* (a), and *The Mayor of Hereford's Case* (b).

For these reasons we think that we ought to abide by the principle of the decision in *Reg. v. Kálidás Keval* (c), that the Legislature has not, by Act XXVI. of 1850, conferred upon or authorised municipalities to assume judicial powers; but even if the point could be regarded as doubtful, we think that the rule *stare decisis* is here properly applicable. That case has not only been followed here, but was not, when decided, new doctrine. This appears from *Reg. v. Malhárji* (d), in which the same Judges who afterwards decided *Reg. v. Kálidás Keval*, though holding that under the Criminal Procedure Code, as it then (November 1866) stood, a Subordinate Magistrate had not jurisdiction to try an

(y) See 1 Rolle Ab. 363.

(z) 3 Ho. of Lds. 759.

(a) 12 Mod. Rep. 669, 686; 1 Salk. 397.

(b) 1 Salk. 396.

(c) 5 Bom. H. C. Rep., Cr. Ca. 10.

(d) 3 *Ibid.* 36.

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offender against one of the rules of the Municipality of Puná, made under Act XXVI. of 1850, Sec. VII., cl. 5, stated their opinion to be that a Full Power Magistrate would have had jurisdiction to try him. And, since Act VIII. of 1869, amending the Criminal Procedure Code, was passed, it has been held by Lloyd and Kemball, JJ., that a Subordinate Magistrate may try an offender against rules made by a Municipality (Egatpurá) under Act XXVI. of 1850, Sec. 7—*Reg. v. Dharmáyá valad Sangápá (e)*—inasmuch as the last part of the Schedule to Act VIII. of 1869, headed “Offences against other laws,” empowers “any Magistrate” to try such offences “if punishable with fine only, or with imprisonment for less than one year,” the court being of opinion that, as the explanatory note No. 7 at the head of that schedule, namely, “The last part of this schedule, headed ‘Offences against other laws,’ shall not be taken to alter or affect any special provision, contained in such laws, regarding the procedure to be followed in the case of offences made punishable thereby,” related only to procedure, and not to jurisdiction, it did not prohibit the cognisance of such cases by Subordinate Magistrates, provided that the offence be punishable by fine only, or with imprisonment for less than one year. We agree with our brothers Lloyd and Kemball in thinking that the amended Schedule C. P. C. gives jurisdiction to Subordinate Magistrates to punish breaches of Municipal Rules. The exception in Sec. 21 of the Criminal Procedure Code, of “offences which are by any such law made punishable by some other authority therein specially mentioned,” has not been overlooked by us. The case of *Reg. v. Hirá Jivá (f)*, decided upon Reg. XXI. of 1827, Sec. 7, wherein the Zillá Magistrate is specially designated, and other Magistrates impliedly excluded, is an instance of such an exception. But the phrase used in Act XXVI. of 1850, Sec. 10, is “every Magistrate;” and we do not feel compelled to resort to the definition in Act II. of 1839, Sec. 4, to narrow the scope of that phrase, which is in itself sufficiently wide to include “any Magis-

(e) 8 Bom. H. C. Rep., Cr. Ca. 12.

(f) 7 *Ibid.* 59.

trate" within the meaning of the last part of the amended Schedule of the Criminal Procedure Code just mentioned.

On the question whether Rule 29 of the Balsád Rules (as it stood before it was modified by Rule 55), or Rule 29 of the Súrat Rules (as it now appears to stand), is divisible, *i.e.*, can be held good as to the penalty and as to the mode of levying it, but void only as to the mode of adjudication; and whether Rule 17 of the Ahmedábád Rules (before it was modified by the operation of Rule 52) may be regarded as divisible, *i.e.*, good as to the penalty, and void only as to the mode of adjudication and the mode of levying the penalty, we simply point out the authorities, and deem it unnecessary now to express an opinion.

Chief Baron Comyn in his Digest, Bye-law (C. 7) says: "A bye-law, *being entire*, if it be unreasonable in any particular, shall be void for the whole; as if the penalty be unreasonable, or to be levied by imprisonment, sale, &c. &c." In *Rex v. Faversham* (g) Lord Kenyon, C.J., said: "Though a bye-law may be good in part and bad in part, yet it can be so only where the two parts are entire and distinct from each other." Watson, B., in giving judgment in *The Blackpool Board of Health v. Bennett* (h) observed: "Although the old rule of law to be found in Com. Dig., Bye-law (C. 7), which says that a bye-law bad in part is bad in the whole, is qualified to this extent, that, if the good part is independent and unconnected with the bad, the good part would be valid and binding: *Rex. v. Faversham*."

It is not quite just to C.B. Comyn to represent him as laying down generally that a bye-law, bad in part, is bad in the whole, for he guarded his remark with the words "being entire;" which are equivalent to "if indivisible," and such was recognised to be his meaning by the Court of Queen's Bench: *Reg. v. Lundie* (i). That case is itself deserving

(g) 8 T. R. 352, 356.

(h) 4 H. & N. 137, 138; see also *Eden v. Foster*, 2 P. Wms. 327. As to a Canadian ordinance good in part and void in part, see Forsyth's Cases and Opinions, 465.

(i) 8 Jur., N. S., 640, 641, a better report than that in 31 L. J., N. S., 157 Mag. Ca.

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of notice as one in which a bye-law was held to be bad in part and good in part. There one of the bye-laws made by the "pasture masters" of the common pastures of the borough of Beverley, under the 6th Wm. IV., c. 70, passed to provide for the proper regulation thereof, provided that "if any person shall stock and depasture (*inter alia*) a vicious horse on any part of the common pastures, then, and in every such case, the person or persons so offending, and the owner or owners of the said stock and cattle, shall *respectively* forfeit and pay for every such offence the sum of £5." The court held that so much of the bye-law, as referred to the infliction of the fine upon the person actually transgressing the same, was divisible from that portion which referred to the owner of the stock; that the former part of the bye-law was reasonable and good, and might stand independently of the latter part, which subjected the owner to the penalty, which if bad, as being unreasonable, might be rejected. The Judges dwelt much upon the word "respectively" as aiding in a division of the good from the bad portion of the bye-law. Crompton, J., said: "The passage in Comyn's Digest must be held, I think, to apply to those cases where a bye-law is in its nature indivisible; there, undoubtedly, if bad in any particular, it must be held to be bad altogether; but, for the reasons I have stated, this rule is here inapplicable." The opinion of Holt, C.J., in *The Stationers' Company v. Salisbury* (j), already mentioned, appears to have been that the bye-law there was indivisible, and, therefore, wholly void. In *Clarke v. Tuckett* (k) a similar conclusion seems to have been arrived at with respect to a bye-law made by the corporation of Exeter.

We are of opinion that Rule 29 of the Balsád Rules (before it was partially rescinded by Rule 55) was, and Rule 29 of the Súrat Rules (as it now appears to stand) is bad, so far at all events as the right to adjudicate, upon the liability of any offender against those rules to the penalties which they purported to authorise, was reserved to the Municipality. The same vice existed in Ahmedabad Rule 17 before it was

(j) Comberbach 221. (k) 2 Ventris 182, S. C.; 3 Levinz 281.

partly rescinded by Rule 52, with this additional defect, that the right to levy the penalties was reserved to the Municipality, in direct contravention of Secs. 10 and 12 of Act XXVI. of 1850.

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We think that in the Balsád cases the Subordinate Magistrate had jurisdiction, and that the convictions, therefore, ought not to have been annulled.

In the present case from Malcolm Pet, we think that the Magistrate F. P. also had jurisdiction, and, therefore, that this court ought not to interfere with the convictions and sentences.

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REG. v. KA'STYA' RA'MA' et al.

*Jurisdiction—High Seas within three miles from shore—British India, Territorial Limits of—12 & 13 Vict., c. 96—23 & 24 Vict., c. 88—* Sept. 20.  
*Power to legislate for High Seas—Mischief—Ind. Pen. Code, Secs. 425 and 427.*

An offence committed on the high seas but within three miles from the coast of British India, as being committed within the territorial limits of British India, is punishable under the provisions of the Indian Penal Code.

The ordinary Criminal Courts of the country have jurisdiction over such offences by virtue of the Stat. 12 & 13 Vict., c. 96, ss. 2 and 3, extended to India by Stat. 23 & 24 Vict., c. 88.

*Semble.* The Governor General of India in Council has no power to legislate for offences committed on the high seas outside the territorial limits of British India, though he has power to legislate in respect of offences committed on the high seas within three miles of its coasts.

Meaning and effect of Stat. 12 & 13 Vict., c. 69, ss. 2 and 3, considered.

The *Queen v. Thompson* (1 Beng. L. Rep., O. Cr. J. 1) commented on.

Where certain of the inhabitants of the village of Manori, in the Tháná District, sallied out in boats and pulled up and removed a number of fishing-stakes lawfully fixed in the sea within three miles from the shore by the villagers of a neighbouring village: *it was held* (I.) that a Magistrate F. P. in the Tháná District had jurisdiction over the offenders; (II.) that the Indian Penal Code was the substantive law applicable to the case; and (III.) that the offence amounted to mischief within the meaning of Secs. 425 and 427 of that Code.

THIS was an application to the High Court for the exercise of its extraordinary criminal jurisdiction.

The facts of the case and the nature of the application are fully set out in the judgments delivered.

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*Branson* (with him *Shántárám Nárāyan* and *Vishnu Ghanashám*) for the applicants.

*Leith* (with him *Dhirajlál Mathurádás*) for the Crown.

*Cur. adv. vult.*

KEMBALL, J. :—The facts appear to be shortly these.

Upon the sea-shore twenty miles north of Bombay is situated the village of Yerangal, the inhabitants of which are by profession toddy-drawers. Further north of Yerangal lie two fishing villages—one, Málavni, about a mile and a half northwards but slightly inland on a creek, and the other, Manori, from three to four miles due north of Yerangal. Both these villages have claimed for some fifty years the exclusive right to fish in the sea opposite Yerangal by means of stakes—described as being some sixty or seventy feet in length and of considerable circumference—driven in the sea, at some distance out at the close of the monsoon, and nearer in—i. e., about a mile, or a mile and a half, from the shore, in the month of March. In March last the Málavni fishermen put down a number of their stakes in front of the shore of Yerangal village, and were pursuing their calling, when one morning towards the end of April the Manori villagers sallied forth *en masse* in boats, and pulling up the said stakes brought them to shore. For this act the latter were tried and convicted by the F. P. Magistrate, Mr. Mulock, under three heads, namely, 1st, being members of an unlawful assembly held for the purpose of committing mischief; 2nd, mischief; and 3rd, theft; though they were only sentenced to punishment under the 2nd and 3rd heads, the purpose of the unlawful assembling having been accomplished. Against these convictions the accused appealed to the Session Judge of Tháná, who affirmed the first two convictions, but held that the charge of theft was not sustainable, there being no proof of an *animus furandi*; and the case now comes before this court for the exercise of its extraordinary jurisdiction, on the grounds, 1st, that the Magistrate had no jurisdiction in the case, and, even if he had jurisdiction, there was no offence under the Penal Code; and, 2nd, that there was no legal evidence in the case of the commission



of mischief under Sec. 427 of the Penal Code (the Session Judge having found, with reference to the conviction for theft, that there had been no “dishonest” removal, and the complainants having no legal right to place the stakes where they did).

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The question of jurisdiction was hardly mooted in argument, but it was strongly urged against the convictions still subsisting that the law applicable was not that of the Penal Code, but the English law—the effect of 12 & 13 Vict., c. 96, and 23 & 24 Vict., c. 88, s. 1, being to apply the Indian Procedure to the substantive Criminal law of England; that the defendants acted in good faith, believing, under certain orders of the Mámlatdár, that they had exclusive right to the fishery, their object being to assert their own right, and not to cause wrongful loss to the complainants; that as the title to fish was common, the defendants could not be punished for removing the stakes, no injury having been done to them or to the nets; and that there was no “show of criminal force” to constitute an unlawful assembly.

The first question which presents itself for consideration is, whether, assuming that the defendants acted contrary to the provisions of the Indian Penal Code, they were liable to punishment under it—in other words, whether they committed any offence within the territories of British India. It appears to be without doubt that the act which was held to constitute mischief was committed upon the sea beyond low-water mark, though within three miles of the open sea-shore: so that, though it may be taken, on the authority of *The Queen v. Musson* (a) and *Embleton v. Brown* (b), that part of the sea between high and low water is within the body of the adjacent land, and, therefore, within the local jurisdiction of the courts of criminal justice, it will, I think, be readily admitted that after low-water mark is passed, at which point the “high seas” commence, the land ceases, and with it the local jurisdiction. Primarily the jurisdiction to try offences committed on the high seas is vested in the Admiralty Court (into the origin and constitution of which it is unnecessary

(a) 8 E. & B. 900.

(b) 30 L. J., M. C. 1.



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here to inquire), but by 23 & 24 Vict., c. 88, in connection with 12 & 13 Vict., c. 96 (which extended to the colonies generally, and excepted "all such parts and places as are under the Government of the East India Company"), it was enacted that "if any person in British India shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or any other offence, of what nature soever, committed upon the sea or in any haven, river, creek, or place where the Admiral has power, authority, or jurisdiction; or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place, shall be brought for trial to British India, then, and in every such case, all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in India, shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorised, empowered, and required to institute and carry on all such proceedings for the bringing of such persons so charged as aforesaid to trial, and for and auxiliary to, and consequent upon, the trial of any such person for any such offence wherewith he may be charged as aforesaid as by the law of British India would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of British India, and within the limits of the local jurisdiction of the Courts of Criminal Justice." So that now the so-called Mofussil Courts have jurisdiction over persons brought before them charged with the offences committed in places where "the Admiral has, or pretends to have, power, authority, or jurisdiction:" *vide* 28 Hen. VIII., c. 15, s. 1. But, it is argued, the effect of the above enactment is not to extend the provisions of the Penal Code to offences committed on the *high seas*, it having been distinctly provided in Sec. 2 of 12 & 13 Vict., c. 96, that the person convicted "shall be subject and liable to, and shall suffer, all such and the same pains and penalties and forfeitures as by any law or laws now in force persons

convicted of the same respectively would be subject and liable to in case such offence had been committed and were inquired of, tried, heard, determined, and adjudged in England, any law, statute, or usage to the contrary notwithstanding."

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And in support of this contention we are referred to the judgments of this court in *Reg. v. Elmstone, Whitwell, et al.* (c), and of the Bengal High Court in *Reg. v. Thompson* (d). Having carefully considered the question, I am decidedly of opinion that the Penal Code is not applicable to offences committed on the high seas and without the territories of British India, and that a subject of the Queen prosecuted for an offence so committed, and not on board a foreign ship, must be charged with an offence against the English law. No doubt this conclusion involves the absurdity that a resident of British India may, by proceeding out a certain distance from the shore, commit with impunity that which is a crime under the Penal Code but which is not an offence by the English law, e.g., adultery.

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However, I must observe that in neither of the cases above quoted was the question involved as to the liability under the Penal Code for an offence committed on the high seas but within three miles of the shores of India (though in the former case the learned Chief Justice of this court made some valuable observations on the point in the course of judgment); and, after giving the subject the best consideration I can, I am impelled to concur in the opinion of a learned Judge of the Madras High Court (Holloway, J.), who is said to have suggested in *Reg. v. Irvine*, 1st Mad. Sessions 1867—*vide* Mayne's Commentaries on the Penal Code, 6th ed., p. 9—where an offence was committed within three miles of the shores of India, that "the locality was within the territories of British India, as defined in Sections 1 and 2 of the Indian Penal Code." It seems to be settled law, according to the current of modern authority, that the general territorial jurisdiction of a State extends into the sea as far as a cannon-shot will reach, which is usually calculated

(c) 7 Bom. H. C. Rep., Cr. Ca. 89. (d) 1 Beng. L. Rep., O. Cr. J. 1.

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to be a marine league, or three miles (fortunately for the purposes of the present case we may rest contented with this calculation) : so that the ordinary rule, by which the private vessels of every nation on the high seas are subject to the jurisdiction of the State to which they belong, ceases to operate when such vessels enter that part of the sea which is *infra dominium* of any other State, albeit they continue to be bound by their own municipal laws. If, then, a State *may* claim exclusive jurisdiction on the sea to the extent of a marine league from low-water mark of the nearest land, as seems to me to be sufficiently established by the cases of *Rolet v. The Queen* (e) and *The Queen v. Anderson* (f), it is, I apprehend, impossible to avoid the necessary conclusion that *the territories*, strictly speaking, of a State include not only the compass of land, in the ordinary acceptation of the term, belonging to such State, but also that portion of the sea lying along and washing its coast, which is commonly called its maritime territory. I fail to discover, in the absence of special legislation on the subject, any ground for distinguishing between offences (of a like character) committed in different portions of a State's territory. That being so, I find on the points under consideration that, although the alleged offence of mischief was committed without the District of Tháná, the Magistrate F. P. was empowered by statute to take cognisance of it, and that as the venue of such offence was within the territories of British India, the charge was rightly laid under the Indian Penal Code, the 2nd section of which provides that "every person shall be liable to punishment under the Code, and *not otherwise*, for every act or omission contrary to the provisions thereof of which he shall be guilty within the said territories," such provision superseding the provisions of Sec. 2 of 12 & 13 Vict., c. 96, if they ever extended within three miles of these shores.

I will now proceed to consider the next question, whether the act committed constituted the offence of mischief. As I have noted above, the grounds urged against the conviction were that the exclusive right to fish in the place in dispute

(e) 1 L. R., P. C. C. 198. (f) 1 L. R., C. C. R. 161.

was believed to be in the defendants; that there was no intention to cause wrongful loss to the complainants; and that, as the title to fish was common to all the world, the defendants had committed no punishable offence, no injury having been done to the nets or stakes.

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It may be premised that it is neither contended nor proved here that either party had acquired by prescription the exclusive right to fish in front of Yerangal, and also that it is not pretended the stakes offered any obstruction to general navigation. I would further here observe, with reference to the argument that the defendants believed they had the exclusive right of fishing in the particular locality, that the Mámlatdár's decisions afford, in point of fact, no foundation for such a pretence; the most they determined was that the complainants in this case (who were plaintiffs before the Mámlatdár) had not the exclusive right of fishing—a very different thing to saying that that right existed in the defendants: and this, I think, sufficiently disposes of the point raised that the conviction was opposed to the ruling of the High Court of Bengal in *The Queen v. Denoo Bundhoo Biswas and others* (g).

HK 280 m. p 43.

The question for consideration then is narrowed to this: Did the defendants, in pulling up the stakes fixed by the complainants in the sea, commit the offence of mischief: for, if the act of removing the stakes was unlawful, the fact of no injury having been done to the nets or the stakes themselves would not affect the question, it being patent that a change in the stakes was made which destroyed or diminished their value or utility.

The locality where the complainants' stakes were fixed may without doubt be correctly described as one of the *res publicæ* which the State, in the language of Austin, "without leaving or conceding the use of them to determinate private persons, nevertheless permits its subjects generally to use or deal with in certain limited or temporary modes. Such, for example, are public ways, public rivers, the shores of the

(g) 12 Calc. W. Rep., Cr. R. 1.

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sea (in so far as they are not appropriated by private persons), the sea itself (in so far as it forms part of the territory of the State),” things public differing from things common—i.e., things the property in which belongs to nobody, but the right of using which belongs to everybody, such as light, air, running water, the sea—in this particular, that whereas in things common, property is acquired by simply taking possession, no person can acquire property in a *public thing* by occupation, for occupation confers property in such things only as belong to nobody.

*Right* is described by Austin as “the capacity or power of exacting from another or others acts or forbearances.” The question then is whether the act of the complainants in fixing their stakes where they did was fair and reasonable, for it is clear that the law will protect or relieve a subject *lawfully* using a public right, against every disturbance of such right on the part of other persons.

It is admitted that the ordinary and recognised practice of taking fish along the coast is by means of nets attached to stakes. It must, therefore, I take it, be held *prima facie* that the complainants' stakes were lawfully fixed, and that the burden of proving the contrary is on those who committed the damage to their prejudice. Before the Magistrate the defendants appear to have relied on the fact that the existence of the complainants' stakes in some way or other interfered with their own haul of fish; but it is not suggested here in argument, apart from their extravagant claim to exclusive enjoyment, that any tort or wrong was done by the complainants, in the exercise of their user, to the defendants which they were entitled to abate, and indeed there is nothing to show that the complainants' stakes were fixed after those of the defendants. Reference was made at the bar to the case of *Perry v. Fitzhove* (h); but, assuming the existence of an analogy between the sea within a State's territory and a common, it is clear that one important element in that case is wanting here, and that is

(h) 8 Q. B. 757.

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the *unlawfulness* of the use, which it was held could be summarily obstructed.

The learned counsel for the appellants also quoted, in the course of his argument, the case of *Young v. Hichens* (i), but it appeared to me to tell rather against than for his clients: for whereas the defendants here were not charged with taking the complainants' fish, it establishes two points very strongly—1st, that though an injury may be done by one person fishing beside another on the sea, and by various contrivances drawing away the fish to himself, there is no *wrong*; and, 2ndly, that a forcible, violent disturbance of the lawful user of a public right creates such wrong.

The sum and substance of the mischief charged was that the defendants caused wrongful loss or damage to the complainants by removing their stakes, and thereby destroying the character of their property.

Much stress was laid on the words “wrongful loss,” the causing of which is a necessary ingredient of the offence of theft—theft being defined as the moving of property, with intent to take *dishonestly*, or, in the words of Sec. 24 of the Penal Code, “with the intention of causing wrongful gain to one person or wrongful loss to another person.” And it was argued that the Judge's finding on the head of “theft” was fatal to the conviction for mischief, but it hardly requires any argument to show the essential difference between theft and mischief. A person rooting up a number of telegraph posts and throwing them down at a distance could probably not be said to commit theft, though he might, I apprehend, be successfully prosecuted for mischief; and I have no doubt in the present case of the correctness of the conviction of the defendants of “mischief,” in that they, knowing that they were likely to cause damage to the complainants, did remove the stakes from the position where they were of use and value, and where they had been fixed at the expense of much time and labour, thereby considerably diminishing their value and utility.

(i) 6 Q. B. 606.

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I would, therefore, return the papers to the Magistrate. In this view of the case, it is unnecessary to consider the conviction under the head of an unlawful assembly for the purpose of committing mischief, though the question really admits of very little argument.

WEST, J.:—The points raised for the applicants in this case are—

(1) . That they should have been charged and tried under the English Law, and not under the Indian Penal Code.

(2) That the facts proved do not constitute the offence of which they have been convicted under the Indian Penal Code.

(3) That the Magistrate had not jurisdiction to dispose of the case.

The third objection is that which in ordinary cases would first call for disposal, but in this instance the relation of the jurisdiction and procedure to the substantive penal law is such that it will be more convenient to invert this order.

The legislative power of the Governor General in Council at the time when the Indian Penal Code was passed was regulated by Stat. 3 & 4 Wm. IV., c. 85. Sec. 43 of that statute enables the Governor General in Council to make laws for "all persons" and "for all places and things whatsoever within and throughout the whole and every part of the said territories," that is, the territories under the Government of the East India Company (s. 38). As, by Sec. 39 of the same Act, the "superintendence, direction, and control of the whole civil and military government of all the said territories" is vested in the Governor General in Council, and Sec. 45 provides that laws made under Sec. 43 "shall be of the same force and effect within the said territories as any Act of Parliament would or ought to be within the same territories," there can be no doubt that a general power of legislation for British India and its inhabitants was intended to be conferred on the Governor General in Council, as part of the general delegation to him of political powers, sufficient for all the purposes of internal government. But



the Government thus constituted being essentially a subordinate one, the question naturally arose of the extent of its legislative powers as to persons and transactions lying beyond the recognised local limits of the territories placed under it. In the case of *Reg. v. A'lu Páru (j)*, Sir E. Perry was of opinion that "the laws of a country prohibiting crime are personal laws, and render the persons of that country amenable to its criminal jurisdiction wherever the crime may have been committed;" and as "the unlimited delegation of authority to legislate for all persons carries with it the inherent power to pass all such personal statutes as are requisite for the good government of a great country," the Indian Legislature had power to make laws with a view "to prevent excesses and enormities committed on its coasts, or on the uninhabited and barbarous islands in the Indian seas." He thought it quite clear that it was not the intention of Parliament to restrict the powers of the Legislative Council to persons merely within the territories of India." In these views the Chief Justice, Sir H. Roper, concurred.\* At Morley's Digest II., page 394, he says: "When the Legislature of Great Britain proposed to itself to delegate legislative powers with regard to India and the Courts therein to the Legislative Council of India, it is reasonable to suppose it was intended to delegate to such Legislative Council power to prescribe the law to be administered, as well with respect to offences committed on the high seas and prosecuted in India, as with respect to offences committed upon the Indian soil." These opinions, so far as they relate to legislation for the high seas, have lately been questioned, if not virtually overruled, in the case of *Reg. v. Elmatone, Whitwell, et al. (k)*, and it seems impossible to maintain that a general power of legislation for the high seas, where a subordinate Government can neither enforce obedience nor afford protection, is implied in the

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(j) Perry's Or. Ca. 551.

\* Sir E. Perry (Or. Ca. 555) says that no note of the Chief Justice's judgment had been preserved, but this must be a mistake, as such a note, supplied by Sir E. Perry himself, may be found at 2 Morley's Digest, 388.

(k) 7 Bom. H. C. Rep., Cr. Ca. 89.



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delegation to it of authority to make laws for the territory placed under it. The clearest of political reasoners has said of civil laws that "the making thereof must of right belong to him that hath the power of the sword by which men are compelled to observe them, for otherwise they should be made in vain." This power of the sword a subordinate Government cannot exercise beyond its own territorial limits. It can in general enter into no arrangements with foreign powers for the police of the seas. It cannot confer a national character on the ships which sail from its ports. It is not as Indian but as British ships that vessels registered in the ports of this dependency sail under the protection of the British flag. When Sir E. Perry (Or. Ca. 559) said "laws \* \* \* prohibiting crime are personal laws," he did not, probably, mean to ascribe to them that personality which is recognised by international jurists as giving to certain laws an extra-territorial and almost universal efficacy. The English Common Law regards crimes as altogether local. "The *lex loci* must needs govern all criminal jurisdiction, from the nature of the thing and the purposes of that jurisdiction" (Lord Brougham in *Warrender v. Warrender*). The extra-territorial obligation of laws is founded, according to Blackstone, on natural allegiance, and Baron McClelland (quoted in *Rex v. Johnson*) (1) says: "Every subject of the Empire is bound by his allegiance to the Crown to obey the laws of the Empire." The allegiance of a native of British India is due to the Sovereign of the British Empire, and, binding him equally to obedience to the laws of every province according to their local operation, relieves him *pro tanto* from the operation, as personal laws, of the Regulations of the particular provincial Government under which he happens to have his domicile. When he passes the bounding line of the subordinate jurisdiction, his provincial character merges in that of a wider nationality. For the maintenance of peace and good order within the territories confided to its charge, it is enough that the Local Government should deal with offences committed within those territories, and, under particular circumstances, with those committed by its subjects in the territories of States adjacent

(1) 6 East 591.

to and allied with it. In the case of *Low v. Routledge* (m) L. J. Turner says: "Every alien coming into a British colony becomes temporarily a subject of the Crown, bound by, subject to, and entitled to the benefit of the laws which affect all British subjects. He has obligations and rights both within and beyond the colony into which he comes. As to his rights within the colony he may well be bound by its laws, but as to his rights beyond the colony he cannot be affected by those laws, for the laws of a colony cannot extend beyond its territorial limits." These words express a principle of a local subjection and protection subordinate to a higher and further-reaching connexion of allegiance which are applicable to British subjects generally,—to aliens only as they accidentally share that character at a particular time and place. The guardianship of the general welfare of the Empire is thus properly a function of the Imperial Government. Its delegation is not to be presumed. Its exercise tends to prevent a clashing of laws and jurisdictions which might operate unfavourably on the intercourse of the several component provinces of our colonial dominions. In one class of cases, express provision (17 & 18 Vict., c. 104, s. 290) has been made for preventing a collision of local laws by reducing them in common to the pattern of the imperial law, and every extension of the principle consistent with the adaptation of local laws to local needs brings nearer to us the realisation—for some great sections of the world, at least—of what Savigny has called the "noble prospect of a community of legal convictions and legal life working out a universal practice."

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The considerations seem to me to tend strongly against any recognition of a power on the part of a subordinate government to legislate for the high seas, unless such a power be granted in express terms. But so far as the territory placed under such a government extends, the presumption based on *à priori* probability is all the other way. In granting legislative powers to the Government of India, it must have been intended that such powers should for their proper purposes be sufficient and effective. This they would not

(m) L. R. 1, Ch. App. 47.

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and could not be if their local range was bounded strictly by the line of coast. In the case already referred to, Sir E. Perry says: "Suppose that the fishermen on this coast were discovered to be engaged in a series of fraudulent transactions half a mile from the shore, can it be that, under the clause which enables the Governor General in Council to legislate for all persons, whether British or Native, no power exists to regulate fisheries?" It is obvious that the greatest inconveniences might arise from the possibility of escaping the operation of the laws of British India by merely going afloat a few yards from shore. Writers on international law have recognised the principle that, so far as its own subjects are concerned, every State may properly define the limits of its own territories beyond the line of coast (n). The necessities of orderly government on which this principle rests are as great and obvious in a dependency as in the ruling country. A limit of three miles from shore has thus come to be recognised as undoubtedly within the general powers of local legislation conceded to Colonial Governments (o); on the same ground of public convenience and necessity, it might not unreasonably be argued that these powers extend, except where otherwise expressly restricted, to the making of laws for sea-going vessels engaged in fishing, or on voyages from one port in India to another, and the persons on board such vessels. Such vessels, it might be contended, have a local or colonial rather than a national character, and those on board carry with them a legal consciousness moulded and determined by the local law. Yet the anomaly of offences bearing a different character according as they were committed at sea or on land was one that subsisted for centuries in the English law, and must be endured here as it was in England until provided against by a legislature vested with the requisite authority.

Such, it appears to me, are the general principles by which the extent of the legislative power of the Governor General in Council must be interpreted. When, therefore, the Indian Penal Code was passed—a law of which Sec. 2 says that (n) Vattel, *Dr. des Gens*, 289. (o) *Rolet v. The Queen*, L. R. 1, P. C. C. 198.

"every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said territories"—all persons became liable, I apprehend, for intra-provincial offences to the operation of this law. Mischief to fishing-stakes, or any other infraction of its prohibitions, committed within three miles from the coast, is punishable only under its provisions. Such offences are intended to be so punishable, and the intention of the Indian Legislature to this extent is the intention of the sovereign power.

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It has been contended, however, that Acts of the Indian Legislature are subordinate in their operation to Statutes of the Imperial Parliament, and that the effect of one of the latter (extended to India by a later statute) is at once to confer jurisdiction on the local magistrates over offences committed on the sea, and to make these offences of the same quality as they would be by English law, and, therefore, triable only under the English penal statutes. This argument, which is not without the support of high authority, requires a somewhat critical examination. The Stat. 12 & 13 Vict., c. 96, the earlier of the two referred to, was passed as "an Act to provide for the prosecution and trial in Her Majesty's Colonies of offences committed within the jurisdiction of the Admiralty." The preamble, after a recital of the provisions made by the Stat. 10 & 11 Wm. III., c. 7, and 46 Geo. III., c. 54, for the trial in foreign settlements of offences committed at sea, states that "it is expedient to make further and better provision for the apprehension, custody, and trial in Her Majesty's islands, plantations, colonies, dominions, forts and factories, of persons charged with the commission of such offences on the sea, or in any such haven, river, creek, or place as aforesaid." Here there is no hint to be gathered of an intention to alter in any case the substantive penal law applicable to an offence. The sole aim appears to be an improvement of the jurisdiction and procedure. Sec. 1 says that "If any person within any colony shall be charged with the commission of any.....offence, of what nature or kind soever, committed upon the sea....."

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then all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences ..... as by the law of such colony would and ought to have been had and exercised.....if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the courts of criminal justice of such colony." Here again the words point solely to jurisdiction and procedure. The powers to be exercised, the proceedings to be adopted "for the bringing of such person so charged as aforesaid to trial, and for, and auxiliary to and consequent upon, the trial of any such person," are to be the same as if the charge related to an offence committed "upon any waters situate within the limits of such colony," which here means those limits where they march with those of the Admiralty jurisdiction.

Thus far, then, there is no difficulty. But Sec. 3 provides "that if any such person shall be convicted before any such Court of any such offence, such person so convicted shall be subject and liable to, and shall suffer, all such and the same pains, penalties, and forfeitures as by any law or laws now in force persons convicted of the same respectively would be subject and liable to, in case such offence had been committed and were inquired of, tried, heard, determined, and adjudged in England, any law, statute, or usage to the contrary notwithstanding." On this Sir Barnes Peacock, C. J., observed in the case of *The Queen against Thompson* (p): "The only possible construction of that sentence is that they shall be liable to all such and the same pains, &c., and those only;" and afterwards he proceeds: "The prisoner being punishable then, as I think, according to English Law, it seems to me that he ought to be charged with an offence against the English Law."

(p) 1 Beng. L. Rep., O. Cr. J. 49.

In the particular case then before the court this was unquestionably a correct expression of the law ; the judgment in the case of *Reg. v. Elmstone, Whitwell, et al.* leaves no room for reasonable doubt on the subject. But suppose the "offence" is not reckoned such by the colonial law, are the local courts to take cognisance of it as though it were an offence, because it is one in England? This would be to impose a burden on their legal conscience which they could not well bear. Lord Brougham in the case already cited says : " It may safely be asserted that no instance whatever can be given of the criminal law of any country being made to bend to that of any other in any part of its administration." That which it would be improper to enforce internationally it is not to be presumed that a dominant country intended to enforce in the case of a dependency in matters not affecting their political relations to each other. As an English Court would not enforce a Criminal law of a colony differing from its own, so neither is it likely that it was meant to impose on Colonial Courts an obligation to enforce all the provisions of the English Criminal Law. Suppose, again, the case of a local law of New Zealand, for example, prohibiting the sale of firearms or of gunpowder to the natives ; is it to be said that, because no charge of such an offence could be framed under the English Law, the traffic could be carried on with perfect impunity at a hundred yards from the shore? This would be to nullify the local law in most of the instances in which it is specially adapted to local circumstances, and thus to do away with the chief benefit arising from the existence of colonial legislatures. The true intent of the section I cannot but think is this, that, where the law defining an offence in a dependency coincides with that of England in force when the statute became law, a person convicted of such offence shall not be subject to a severer penalty than the English Law prescribes. It was probably thought, the statute not having been originally applicable to India, that in the colonies, properly so called, a practical identity would be found to subsist between the descriptions of offences in general and those recognised by

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the English Criminal Law. As the statute would include the cases of persons accused of offences committed midway between England and the colonies, it was not unnatural that such persons should be guarded against the operation of a colonial law, possibly differing from their own as to the penalties it awarded, for acts committed before they had ever come within the bounds of the colonial jurisdiction. These considerations would apply very properly to such a case as that of *The Queen against Thompson*, and justify the proceedings taken against him; but it cannot have been meant that all local regulations as to the conduct of persons afloat were to be rendered inoperative. The section, as I read it, begins to operate only from the moment at which a conviction has been had. Such a conviction, if of an act committed beyond the local jurisdiction, must be of an offence under the English law; if of an act committed within the local jurisdiction, it must be of an offence according to the local law, whether that coincides with the English law or not. When such coincidence exists as to the description of the offence, or when the offence has been committed at more than three miles from shore, the punishment is limited by the English law: when such coincidence does not exist, and the offence has been committed within the local jurisdiction, the section ceases to operate, and the penalty is determined solely by the local law.

As this view of the law, though recommended, as I think, by its obvious fitness and convenience, differs, if his language be taken as the expression of a general principle, from that taken by so eminent a Judge as the late Chief Justice of Bengal, and is besides opposed to some of the national prejudices which make Englishmen inclined at this day to repeat that plea of "*Civis Romanus sum*" which has been declared inconsistent with all legal principle, it will be desirable to support it, if that may be, by authority. One is naturally led in a case of this kind to trace the Admiralty statutes back to their sources. Before the 28th Henry VIII., c. 15, a person who had committed an offence at sea could be tried by the Court of Admiralty only accord-



ing to the Civil and Maritime law. By that statute it is provided that "all treasons, felonies, robberies, murders, and confederacies to be committed in or upon the sea, &c. shall be tried, heard, determined, and judged in such shires and places in the realm as shall be limited by the King's commission or commissions to be directed for the same, in like form and condition as if any such offence or offences had been committed or done in or upon the land." The persons commissioned were to hear and determine such offences "after the common course of the laws of this land used for treasons, &c. ....done and committed upon the land within this realm." To "determine and adjudge" as if the offences had been "committed upon the land within this realm" are strong words; but still stronger ones follow:—"It is further enacted.....that if any person.....happen to be indicted for any such offence.....that then such order, process, judgment, and execution shall be had, used, done, and made..... as against traitors, felons, and murderers, for treason, murder, robbery, or other such offence done upon the land by the laws of this realm, is accustomed.....and such as shall be convicted of any such offence.....shall have and suffer such pains of death, &c. ....as if they had been attainted and convicted of any treasons, felonies, robberies, or other the said offences done upon the land." Here we have a jurisdiction given to "determine and adjudge offences," and then to punish them according to the English law. The indictment then, according to the reasoning in *The Queen against Thompson*, should necessarily have been of an offence against the English law and defined by it. Yet it was resolved by all the Judges, as Coke informs us (Inst. I. 391a), in the 2nd Jac. I., that "the statute of Henry VIII. did not alter the offence, but ordain a trial and inflict punishment," and that consequently some persons guilty of piracy were not entitled to the benefit of a general pardon of felonies, as they must have been had the mere assimilation of procedure and penalties effected any change in the nature of their crime. For a conviction proof would still be required of the acts or omissions constituting the offence according

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to the Civil law. This law the 11th & 12th Wm. III., c. 71, empowered the Admiral to administer abroad; and finally, notwithstanding the long-subsisting identity of penalties for offences recognised by both systems of law, the Stat. 39 Geo. III., c. 37, was required to make offences committed on the high seas "offences of the same nature respectively as if they had been committed on the shore." In the case of *The King against Depardo (q)*, Burrough, for the prisoner, says: "The Stat. 28 Henry VIII., c. 15, merely altered the mode of trial in [the Admiralty] Court; and its jurisdiction still continued to rest on the same foundations as it did before that Act"; and this was not contradicted by the Judges,\* or by the accomplished lawyer (Abbott) who appeared for the Crown. I feel justified then in holding that a statute which does not say that the offences to which it relates shall be of the same nature—that is, conformable to the same definition, as well as entailing the same consequences—as under the English law, does not, by merely prescribing an identical punishment where an identity between the offences may subsist, as denominated and defined by a Colonial and by the English law, make it necessary in any case that the trial should be had upon a charge of an offence according to the English law. That necessity where it exists is determined by circumstances which I have already considered.

It follows that the Indian Penal Code is the substantive Criminal law applicable in my opinion to each of the offences of which the applicants were accused in this case. If the offence of which they were convicted had happened to be identical in its definition with any offence under the English law, they might perhaps insist that the penalties inflicted should be limited both as to kind and as to degree by the provisions of the English law. It would then have to be considered whether the Penal Code, having for India the authority and effect of an Act of Parliament on a special subject and relating to a particular province, was affected in its operation by a statute so general in its terms and application as the Stat. 12 & 13 Vict., c. 96. The Governor

(q) 1. Taunton 29.

\* Lord Mansfield, C. J., Heath and Grose, JJ.

General in Council could not, under 3 & 4 Wm. IV., c. 85, s. 43, pass any Act which should “repeal, vary, suspend, or affect.....any provisions of any Act hereafter to be passed in any wise affecting the said Company or the said territories or inhabitants thereof,” but the question would still remain, whether in this particular case the enforcement of the Penal Code would really deprive the English statute of any part of its intended operation (*r*). But it has not been contended that the definitions in the Penal Code of the offences charged in this case are identical with any under the English Criminal Law, or that, if they are, the punishment inflicted exceeds that which the English law allows in the like cases. So far, therefore, as the law under which the cases have been tried is concerned, I hold that the convictions are perfectly good.

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The Magistrate, without recording a formal finding or awarding punishment on the charge against the accused of having formed an unlawful assembly, convicted them of having committed mischief and theft. The Session Judge reversed the conviction of theft. It has to be considered whether the Magistrate had jurisdiction as to the charge of mischief. The mischief consisted in pulling up and removing a number of fishing-stakes fixed in the ground by the prosecutors at a mile or more from the shore. Sec. 21 of the Code of Criminal Procedure determines the offences of which Magistrates in the Mofussil may take cognisance as those punishable under the Penal Code, or under any special or local law. It appears to me very questionable whether, supposing that the whole Criminal Code of England as it existed in 12 & 13 Vict. was made applicable in particular circumstances in India, powers exercised in giving effect to it could be considered as an exercise of jurisdiction “under a special law” as defined in Sec. 4 of the Code of Criminal Procedure. But, waiving that question, I find it laid down in Sec. 26 that, “except where otherwise expressly

(*r*) See *Fitzgerald v. Champneys*, 2 J. & H. 46; *Williams v. Pritchard*, 4 T. R. 2; *Eddington v. Borman*, 4 T. R. 4; *Perchard v. Heywood*, 8 T. R. 473.

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provided by this Act, every offence shall be inquired into and determined in the district, or division of a district, in which the offence was committed." The Code does not apparently contemplate at all the commission of an offence outside the line of coast. "District" is defined as "the local jurisdiction of a Magistrate of a District," and Magistrate of a District as the "chief Officer of a District." Definitions such as these, including the word defined, can give us no help: we must look elsewhere for the local boundaries of the Magistrates' jurisdiction. The Stat. 53 Geo. III., c. 155, s. 110, contains a recital amounting to a legislative declaration that "the Courts established by the said [East India] Company have no jurisdiction over crimes maritime." This was made the basis by Mr. Erskine, Judge of the Konkan in 1859, of an argument by which he demonstrated that he had not Civil jurisdiction in a suit between the same parties whose contentions have resulted in the present case. On appeal his decision declining jurisdiction was affirmed by the late Sadr Court. In the judgment of the Sadr Court it is said: "We find no authority for the extension of the limits of a zillá beyond the low-water mark towards the open sea." The word Zillá, which is equivalent to District, then entered into the designation of the principal local Magistrate (Reg. XII. of 1827, Sec. 1). No authority beyond low-water mark was assigned to him in either his judicial or his executive capacity. The power assigned to him as Collector, under Reg. XVII. of 1827 and Act XVI. of 1833, of giving immediate possession of fisheries, must be construed, when taken with the context, as applying only to inland fisheries within his ordinary jurisdiction. But then came the Stat. 12 & 13 Vict., c. 96, which gives jurisdiction to local Courts and Magistrates as if the offence had been committed "within the limits of the local jurisdiction of the Courts of Criminal Justice." What court then has jurisdiction in this case? The state of the law being such as I have described when the Code of Criminal Procedure was passed, if it had been intended to extend the local jurisdiction of the Magistrate of the District, or in other words the District, to seaward, express provision would have been made for the

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purpose. No such provision occurs, and, subject to the express provision of the Legislature, it appears to me that the analogy holds true of what is said at 3 Hagg. Adm. Rep. 275, 290: "No one ever heard of a land jurisdiction of a body of a county which extended to three miles from the coast." The offence of mischief here has not been committed within any district, and could not, under the Code, be inquired into or tried in any district. But again the Stat. (12 & 13 Vict., c. 96, s. 1) comes in aid of the local law, and says that all Magistrates shall have jurisdiction as if the alleged offence had been committed upon any waters situate..... within the limits of the local jurisdiction of the Courts of Criminal Justice." The words "any waters" are very wide. They will include any one of the numerous shallow creeks and streams within the body of the land in the Tháná District. Over offences on such waters the Magistrate would undoubtedly have jurisdiction: consequently he had jurisdiction over the offence in this case; and having jurisdiction he was bound to pursue the course of investigation prescribed by the Code of Criminal Procedure. This investigation led the Magistrate to the conclusion that the accused (the present applicants) were guilty of having, within "the limits of the village of Yerangal, committed mischief by causing damage to the amount of Rupees 50 by tearing up certain fishing-stakes, and thereby committed an offence punishable under Sec. 427 of the Indian Penal Code." The definition of the offence is contained in Sec. 425 of the Penal Code:—"Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such damage in any property or in the situation thereof, or destroys or diminishes its value or utility, or affects it injuriously, commits mischief." That in this case a change has been made in the situation of the fishing-stakes, diminishing their utility to the owners, has not been denied. But it is said there has not been any wrongful loss or damage occasioned to the complainants. Wrongful loss is defined in Sec. 23 of the Penal Code as "the loss by unlawful means of property to which

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the person entitled to it is legally entitled." A question might arise as to whether the mere removal of property, as in this case, to another situation, without any intent to appropriate it, or to deprive the owners of the power of recovering it at will, would amount to a "loss" of such property; but there can be no doubt that the removal of the stakes, though without any intent to appropriate them, occasioned "damage" in the sense of pecuniary injury to the complainants.

*J. L. K. D. M. J. 1873*  
This damage the applicants must have known that their proceedings would cause; and if their acts were "wrongful" the definition of "mischief" is satisfied. What "wrongful" means in this connexion is to be ascertained from Sec. 23, which I have already quoted, and a definition of wrongful damage is thus arrived at as "damage caused by unlawful means to the property of another." For the applicants it has been urged that there was no property of the complainants in the situation of the fishing-stakes, though they were owners of the stakes themselves, and that the applicants' rights having been injuriously affected by the stakes being placed where they were, their removal in the manner found by the Magistrate was not a use of "unlawful means." This raises a question of the relative duties and rights of the parties, the complete solution of which involves a rather wide inquiry. I will compress my remarks on the subject into as brief a compass as possible.

The Civil Law regarded the land covered by the sea, so far as the utmost high-water mark, as common property. I quote some extracts which are instructive in their bearing upon the whole matter that we have now under consideration:—

"Et quidem naturali jure communia sunt omnium hæc, aër, aqua profluens, et mare, et pro hoc littora maris..... Flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque..... Littorum quoque usus publicus est et juris gentium, sicut et ipsius maris et ob id cuilibet liberum est casam ibi ponere in quam se recipiat..... Proprietas autem eorum potest in-

telligi nullius esse, sed ejusdem juris esse cujus et mare et quæ subjacet mari, terra vel arena."—Inst. II., 1 fr. 1, 2, 5.

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Consistently with the doctrine here enunciated, the Roman lawyers held that the first to erect a structure on the sea-shore gained a title by occupancy so far as this was consistent with the public interests—a limitation urged with great force and ability by Best, J., in the case of *Blundell v. Catterall* in a judgment overruled, for reasons still more weighty, by the other Judges (Abbott, C.J., Bayley and Holroyd, JJ.) who sat in that case. The Civil Law was in these matters but partially followed by the Feudal Law, the doctrines of which were received into the Common Law of England. By this the property in the sea-shore and the bottom of the sea is reckoned amongst the *jura regalia* of the Crown, a disposition which is advantageous to the community, as it tends to prevent the conflicts which are apt to arise in consequence of disputed rights of occupancy. The English law on this subject may be gathered from *Blundell v. Catterall* (s); *Benest v. Pipon* (t); *Malcomson v. O'Dea* (u); *Sir H. Constable's Case* (v); and Butler's note to Coke on Littleton, Sec. 440, in which Lord Hale's treatises *De Jure Maris* and *De Portubus Maris* are abundantly quoted. These authorities support both the ownership by the Crown of the soil under the sea, and the proposition that the subjects of the Crown "have also by common right a liberty of fishing in the sea, and in its creeks or arms, as a public common of piscary." "Yet in some cases the King may enjoy a property exclusive of their common of piscary. He also may grant it to a subject; and consequently a subject may be entitled to it by prescription" (Hale de J. M., p. 11). The sovereign's rights are as great under the Hindú and Muhammadan systems as under the English; but, without a minute examination of these, it is sufficient to say that by the acquisition of India as a dependency, the Crown of Great Britain necessarily became empowered to exercise its prerogatives and enjoy its *jura*

(s) 5 B. & Ald. 268. (t) 1 Knapp P. C. C. 60. (u) 10 H. L. Ca. 593.

(v) 5 Rep., p. 105 b.

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*regalia* in this country and on its coasts, subject always to the legislative control of Parliament (*Campbell v. Hall*, Cowp. 204).

These are involved in the very idea of English sovereignty. I am not aware that in any case they have been so used as to exclude any subject in this country from fishing in any part of the sea. No grant of a fishery in the present case has been set up either as directly proved, or as to be inferred from prescriptive enjoyment. The complainants and the applicants alike must rest on their common right of fishing in the sea; and a permission in favour of one or the other party by the villagers of Yerangal, as given without title, could confer none upon either.

In the enjoyment of the common right of fishing, every subject of Her Majesty, except where expressly restrained by statute, is entitled to make use of the means ordinarily employed for that purpose. The existence of the one right implies that of the other (5 B. & C. 885). But the right must, like that of using a navigable river, or highway, be exercised so as not to interfere unreasonably with a like enjoyment on the part of others. In the case of such an interference the law provides a remedy. In some instances an obstruction to general enjoyment may be abated, without recourse to the courts, as a nuisance. The case has been quoted to us of *Perry v. Fitzhove* (w), and this, taken with the subsequent case of *Davies v. Williams* (x), establishes the principle that "a commoner may pull down a house wrongfully erected so as to prevent his exercising his rights as fully as he might otherwise have done, and even, after due notice," though the house be at the time actually inhabited. But the plaintiffs in these cases were obviously wrong-doers. They erred not merely in using a right to excess, but in assuming to exercise a right at all. *Sadgrove v. Kirby* (y) shows that "if the easement be injured to a certain degree only, or if it may be a question whether injured or not, in the nature of things it cannot be a subject of abatement." That was a case in which a commoner cut down trees

(w) 8 Q. B. 757; S. C., 15 L. J., Q. B. 239.

(x) 16 Q. B. 546; S. C., 20 L. J., Q. B. 330. (y) 6 T. R. 483.

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planted by the lord of the manor, and is to be contrasted with the cases of *Mason v. Caesar* (z) and *Arlett v. Ellis and others* (a), in which the breaking down of hedges which excluded commoners from enjoying their rights was held justifiable. Now in the present case, what right have the applicants, what right do they even assert, that would authorise them to remove the complainants' fishing-stakes as a nuisance? Their common right of fishing gave them no such authority. A commoner, if we are to be guided by this analogy, is not justified in distraining the cattle of his fellow-commoner merely because they are excessive in number (2 Bac. Abr. 102). The enjoyment of the right of fishing by the complainants was in no way inconsistent, so far as the facts found enable a judgment to be formed, with the exercise of a similar right by all Her Majesty's subjects; but even if this had not been so, the applicants must, as a justification for their conduct, have shown that the alleged nuisance inflicted some private and special injury on them personally, which they could not without great inconvenience escape except by abating it. As observed by Lord Campbell, C.J., in *Bateman v. Bluck* (b), "a party can only abate an obstruction so far as is necessary to enable him to exercise his own right. .... A person cannot at his pleasure go into a public highway and remove an obstruction which may happen to be there." In *Dimes v. Petley* (c) an action was brought for injury to the plaintiff's wharf occasioned by a vessel of the defendant. The defendant pleaded that the wharf was a common nuisance, as causing an obstruction to navigation, but this plea was held bad for not alleging that the nuisance could not have been avoided by taking any other course with reasonable convenience.

Thus the accused, finding a particular space in the sea occupied by the Málavni fishermen, were bound themselves so to pursue their own calling, if they could, as to leave their rivals without molestation. The cases to which I have referred might be corroborated by many others, but they

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9LR 280m. 156.

(z) 2 Mod. 65.  
(b) 21 L. J., Q. B. 406.

(a) 7 B. & C. 346.  
(c) 19 L. J., Q. B. 449.



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seem to me to be quite sufficient, for the purposes of this case, to overcome the inference attempted to be drawn from *Perry v. Fitzhowe* in favour of the applicants. But before quitting this branch of the subject, I will refer to the case of *The King against Russell (d)*. In the report of that case, remarkable for the array of eminent names connected with it both on the Bench and at the Bar, many observations occur which make it as instructive even as *Blundell v. Catterall*. At page 571 Lord Hale de Portubus is cited in argument to the effect that "where the soil is the King's, the building below the high-water mark is a *purpresture*, an encroachment, an intrusion on the King's soil, which he may either demolish or seize or arent at his pleasure, but it is not *ipso facto* a common nuisance, unless indeed it be a damage to the port and navigation." Holroyd, J., in his judgment, after enumerating various rights that may be exercised in a port, says: "The enjoyment of each of those rights by some is frequently and necessarily an obstruction to the free and complete enjoyment either of the same rights, or of some other of the above rights, in others.....But such obstruction is not necessarily, or as a matter of law, a public or a private nuisance. Each of the rights must occasionally yield and become subordinate, as may be necessary or reasonable—at least in part—to some of the others. The public, that is, each individual, has not an absolute right to navigate, i.e., to sail over, every part of the river, but only where there is not otherwise a legal preoccupation by others." Immediately afterwards, quoting Lord Hale, he remarks: "It is not, therefore, every building below the high-water mark that is *ipso facto* in law a nuisance;" and further on he approves of the direction to the jury: "Do the purposes of public benefit resulting from the staith countervail the prejudice which individuals may sustain by having the exercise of their rights of passage narrowed?.....If you think this is placed not in a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, or that the public benefit resulting from it is not equal

(d) 6 B. & Cr. 566.

to the public inconvenience which arises from it, then you will find your verdict for the Crown." Bayley, J., maintained the same opinions, and at page 598 he asks: "Is the place in which the public benefit accrues material?.....The King is equally the guardian of the public rights of all his subjects; all his subjects are equally under his care; and if public benefit results, it is immaterial whether it is to his subjects in London or to his subjects at Newcastle." Let us now apply these principles to the case before us. It is quite obvious that the efficiency of the fisheries on the coast is an element of the public welfare of this community. Their efficiency is known to depend on measures such as those which the complainants in this case took for carrying on their business; indeed, it was the very efficiency of the fishery which gave occasion to the foray made upon it. It is not alleged that the setting up of the stakes occasioned any obstruction to navigation. The only right affected was the common right of fishing, which the people of Manori possessed in no higher degree than those of Málavni. The fishery of the latter was no public nuisance; there is no pretence for saying it was a private nuisance to any property held by the applicants, whose act, therefore, in dislodging the stakes, and thus breaking up the fishery, was clearly unlawful. The Málavni fishermen had a property in their stakes, not merely as so many pieces of timber, but as arranged in a particular way. To replace them would cost time and labour. The removal of them impairs their means of living. These injuries constitute wrongful damage in the sense of the Indian Penal Code, and the conviction must, I think, be sustained.

One point, however, has been urged in the applicants' favour, which deserves a little further consideration. It appears that in 1865 the Mámlatdár of Salsette gave to the accused an order empowering them to retain the enjoyment of the fishery as hitherto. This, it is said, entitled the accused to sole possession and enjoyment of the fishery, or at least justified them in supposing that they had an exclusive right to it. It might be sufficient to say that the

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Mámlatdár had no jurisdiction to deal with sea-fisheries. His powers were not intended by Bombay Act V. of 1864 to be extended beyond those of the Collector and his Assistants under the Regulations and Act XVI. of 1838. Those who engage in acts of violence on an insufficient warrant do so at their own peril. But the order relied on is in truth not one which assigns to the Manori fishermen any exclusive enjoyment of fishing-rights over a definite district of the sea. Much less does it purport to empower them to tear up the fishery of their neighbours the people of Málavni. It cannot have the effect of exonerating them from the natural consequences of their conduct, on the ground that they did not know that they were about to cause wrongful damage. They appear to have been led into violence chiefly by the mischievous guidance of the late unfortunate Mr. Morobá Kánobá. I trust the result will for the future prevent their taking the law into their own hands, as it must teach them that thus used, or abused, it is a dangerous weapon—more likely, perhaps, to injure those who employ it than their antagonists.

I concur in dismissing the application.

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July 3.

*L. R. 5 Bom: p. 355*

*Jurisdiction—European British Subject—Offence committed in Indian Foreign Territory—Penal Code.*

A European British subject is liable to be tried in the High Court of Bombay for an offence against the Indian Penal Code committed in the territories of a Native Prince in alliance with Government upon charges framed under the Penal Code.

AT the third Criminal Sessions of 1871 (held by SARGENT, J.), G. P. Chill, a European British subject, was by the Clerk of the Crown charged as follows:—

(I.) That he, the said G. P. Chill, on the 1st of January 1871, at Kennagh Khedá, in the village of Sat Khanda, in the Parganá of Nimbaherá of Tonk of Rájputáná, within the jurisdiction of the High Court of Judicature at Bombay, did wrongfully confine one Udá Jívá, against the form of the

Indian Penal Code, in such case made and provided. (Sec. 342.)

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(II.) That he, the said G. P. Chill, &c., on the Nasirábád road near the said village, did unlawfully compel the said Udá Jívá to labour, against the will of the said Udá Jívá, against the form, &c. (Sec. 374.)

(III.) That he, the said G. P. Chill, &c., did abet the commission, by Shívlá Udá and others, of the offence of wrongful confinement of the said Udá Jívá, and that the said Udá Jívá was wrongfully confined in consequence of such abetment, against the form, &c.

Upon the prisoner being arraigned, *Anstey*, who was for the defence, submitted that the court had no jurisdiction to try the accused on these charges, for that, if triable at all, the accused was triable upon charges framed under English law, and not under the Penal Code; and that the acts alleged against the accused were not crimes or offences according to English law, an objection which no possible amendment of the charges would obviate. He referred to 33 Geo. III., c. 52, s. 67 : Act I. of 1849 ; Act VII. of 1854 ; Indian Penal Code, Secs. 2, 3, and 4. He said that this act might not be an offence in Tonk.

*Mayhew, contra* :—The 44th section of the Charter of the Supreme Court gave that court jurisdiction to try a case like the present, and that jurisdiction is continued to the High Court by Cl. 21 of the old, and Cl. 22 of the new Letters Patent. The prisoners are rightly charged under the Penal Code : *Reg. v. Watkins (a)*. The court will judicially notice the fact that Tonk is part of a State in alliance with the Government.\*

SARGENT, J. :—I think the court has jurisdiction in this case. Sec. 67 of 33 Geo. III., c. 52, says : “And be it further enacted that all His Majesty’s subjects, as well servants of the said United Company as others, shall be, and are hereby

(a) 2 Mad. H. C. Rep. 444.

\* See Aitchison’s Treaties, Engagements, and Sunnuds, Vol. IV., pp. 290–293.

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declared to be amenable to all Courts of Justice, both in India and Great Britain, of competent jurisdiction to try offences committed in India, for all acts, injuries, wrongs, oppressions, trespasses, misdemeanours, offences and crimes whatever, by them or any of them done or to be done or committed in any of the lands or territories of any Native Prince or State, or against their persons or properties, or the persons or properties of any of their subjects or people, *in the same manner* as if the same had been done or committed within the territories directly subject to and under the British Government in India." By Sec. 44 of the Charter of the late Supreme Court it was empowered to take cognisance of all treasons, murders, \* \* \* crimes, extortions, misdemeanours, trespasses, wrongs and oppressions committed by any of Her Majesty's subjects in any of the territories subject to or dependent upon the Government of Bombay, or in the territories of Native Princes or States in alliance with the Government of Bombay. This court, therefore, which has the same criminal jurisdiction as the late Supreme Court, has criminal jurisdiction in respect of all acts committed by British subjects in Native States in alliance with the said Government which would be offences if committed in British territories. The charge against the prisoner alleges an act which was undoubtedly an offence under the Penal Code. It was urged by the learned counsel for the accused that it might not be an offence in Tonk : but that is immaterial. I am, therefore, of opinion that this court has jurisdiction in the case, and that the prisoner is rightly charged under the Penal Code.

His Lordship reserved the point for the opinion of the Full Court, but the prisoner was acquitted, and the point reserved was, therefore, not argued.

*In re* KA'SAM PI'RBHA'I and his wife HI'RBA'I.1871.  
July 21.

*Order for Maintenance upon Husband—Muhammadan Law—Divorce of Wife by Husband—Effect upon Order—Act XLVIII. of 1860, Sec. 10—Custom—Khojá Muhammadans—Divorce.*

An order made by a Magistrate under Act XLVIII. of 1860 (Police Amendment Act), Sec. 10, directing a Muhammadan husband to pay a sum monthly for the maintenance of his wife, does not deprive such husband of his inherent right to divorce his wife, and after such divorce the Magistrate's order can no longer be enforced.

Custom as to divorce amongst Khojá Muhammadans of the *Sunni* sect considered.

ON the 3rd of October 1870, *Mayhew* obtained a rule *nisi* for a writ of *certiorari* to issue, directed to John Connon, Esquire, J. P., and Senior Magistrate of Police, for the removal into the High Court of the proceedings taken before him in the matter of a complaint made against Kásam Pírbháí by his wife Hírbái for her maintenance, and the order on Kásam Pírbháí to pay Rs. 25 *per mensem* for the maintenance of Hírbái, and in the matter of the application of Kásam Pírbháí to cancel the lastmentioned order.

The facts of the case were these :—Kásam Pírbháí and Hírbái, Khojá Muhammadans, were married to one another in the *Sunni* form, before the Kázi of Bombay, about the year 1849. At that time all Khojá Muhammadans resorted to one common *jamát*. Kásam Pírbháí and Hírbái apparently did not live happily together, and Hírbái about six months after her marriage went to live with her mother. Kásam Pírbháí applied to the *jamát* for leave to marry a second wife. Leave was granted to him to do so. Before the second marriage took place, Pírbháí's father, by the direction of the *jamát*, made an arrangement for the maintenance of Hírbái, which, as entered in the books of the *jamát*, ran thus :—

“To the *Mukhi* of the Bombay community (*jamát*, namely) : Dost Muhammad Ladháni and Pírbháí Abhrám and Varas Nathuáni, and all the community : written by Pírbháí Assar (to wit). The reason of this being written is as follows :—I am about to get my son Kásam Pírbháí married to a second wife in addition to (his present) one wife. As long as she may remain faithful to my son, should she act agreeably to the rules of the *jamát* and according to its directions, the *jamát* (community) shall cause

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food and clothes to be given to her. 3rd of *Vaisák Shukl* S. 1908 (21st April 1852). Written by Khojá Pírbháí Assar, his signature, agreeably to what is written above. It is valid."

About two years after Pírbháí's second marriage, Hírbái went and lived with him for about a year. She then, being pregnant, left her husband and went to live with her mother. A daughter was subsequently born to Hírbái. About two years after her return to her mother's house, Hírbái applied to the *jamát* for maintenance, and the *jamát* ordered Rs. 5 per month to be paid to her by her husband (as he said, for the maintenance of her daughter, but as she alleged, for her own maintenance). This sum was paid to Hírbái down to March 1870, when she applied to the Senior Magistrate for an order directing her husband to maintain her. The Magistrate, on the 28th of March 1870, made an order, under Sec. 10 of Act XLVIII. of 1860, directing Kásam Pírbháí to pay Rs. 25 per mensem for the maintenance of Hírbái. This sum was paid down to the 28th of August following, when Pírbháí divorced his wife Hírbái with the concurrence of the *jamát* to which he belonged. Hírbái's *mohar* or dower was then offered to her, but she refused to receive it, as she did not admit the validity of the divorce.

The *talaknámá* (which was registered in the books and impressed with the seal of the Kázi of Bombay) was in the following form :—

"The cause of these lines being written is as follows:—I, who am named Kásam, the son of Pírbháí Khojá, am an inhabitant of the populous seaport town of Bombay. I make a true declaration, and clearly give in writing, while sound in mind and body, willingly and without being forced by any person, to the effect as follows:—A female named Hírbái, the daughter of Vali Pírbháí Khojá, is married to me, and resides in her mother's house, and does not come to my house, and does not remain obedient and subject to me, and the abovenamed female is refractory. Wherefore, by reason of our disagreeing, disputes have arisen between us. I, therefore, in person having appeared in the Muhammadan Law Court, and having paid to the abovenamed female named Hírbái her dowry, which is 19 *miskáls* of gold, making Rs. 125; and her *parla* (i.e.) marriage presents, amounting to 10 *tolás* of gold, making Rs. 150; and 5 *seers* of silver, making Rs. 140; and an allowance for maintenance for three months during the *idat* time, making Rs. 75: amounting in all to Rs. 490, which it was proper for me to pay, have divorced her three times, and have dismissed her from her relation of wife to me. Henceforth there does not

exist and will not remain any claim whatever by me to the abovenamed female Hírbái on account of her relation as wife and her nuptial alliance to me. Should I raise any claim, the same will be null and void, and inadmissible according to the law and custom. Therefore these few words have been written by way of a record of divorce that it may be a voucher in times of need. Written on Monday the 1st day of the month Jamá-di-Ussáni in the Hijri year 1287 (29th August 1870)."

(Attestations here follow.)

"KA'SAM PI'RBHA'I.

"Agreeably to what is written above—it is valid."

Kásam Pírbháí then applied to the Senior Magistrate to cancel his order for the maintenance of Hírbái. This was refused, and Kásam was obliged to continue to pay the maintenance-money, in consequence of which he made the present application to the High Court, and asked that the order for the maintenance of Hírbái, so far as it related to future payments, should be quashed or annulled.

It appeared from a joint affidavit of Rahim Hemráj and three other members of the Khojá community that the Khojás, about ten years before the present application, separated into two sections, the *Sunni* Khojás and the *Shiá* Khojás, and that the former, who had down to that time always resorted to the general Khojá *jamát*, thenceforth resorted to a separate *jamát* of their own, having a separate *mukhí* and *kamaria*. Kásam Pírbháí, being a *Sunni*, attended the new *Sunni jamát*.

The *rule nisi* was argued before WESTROPP, C. J., and BAYLEY, J., on the 20th and 21st of July 1871.

Green showed cause on behalf of Hírbái:—(I.) A Muhammadan cannot, by divorcing his wife, get rid of the effect of an order for her maintenance made upon him, as there is no provision in Act XLVIII. of 1860 which, under such circumstances as the present, or indeed under any circumstances, gives the Magistrate power to cancel his order, though on an alteration in the circumstances of the husband or wife the Magistrate is given power to *reduce* the amount of such maintenance: see Sec. 10. To admit a husband's power thus to evade an order for maintenance would be to render the salutary provisions of the Act a mere nullity

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in the case of Muhammadans. (II.) The parties in this case at the time of their marriage belonged to the general Khojá community before the *Sunnis* seceded from it. There is a custom amongst that community that no divorce shall be valid unless made with the consent of the wife and with the approval of the *jamát*, which consent is not given unless provision is made by the husband for the future maintenance of his divorced wife. That custom I am prepared to prove by evidence. A husband cannot, by seceding from the community to which he and his wife belonged at the date of their marriage, deprive his wife of the benefit of the customs of that community. Before giving Hírbái a *talaknámá*, Kásam Pírbháí was bound to obtain the consent of the general *jamát* of the Khojá community; and, not having done so, the alleged divorce is invalid.

*Anstey* (with him *Mayhew*) in support of the rule:—There can be no doubt of the right of a Muhammadan, whether *Shiá* or *Sunni*, to divorce his wife: Baillie's *Imameea*, pp. 29, 33. As to the form in which such divorce should be given, see p. 114 of the same work. "The declaration of divorce is wholly in the will or caprice of the husband, and he is not bound to disclose the causes which move him thereto. As to the wife the divorce is unconditionally obligatory on her, but the husband is bound to hand over to the wife all her property and the *mohar*." *Nicholaus von Jornauw* (German ed., 1850), p. 168: *Moonshee B. Ruheem v. Luteefoortee Nissa* (a). A *Sunni* may marry a *Shiá* wife: *Syud Gholam v. Mussamut Sitaba Begum* (b), and if so, *à fortiori* he may divorce her. Here there has been a divorce by competent authority, namely, that of the husband: and the simple question is, can a Magistrate's order under Sec. 10 of Act XLVIII. of 1860 put it out of a Muhammadan husband's power to dissolve the relation of marriage between him and his wife, and thus abrogate the general provisions of the Muhammadan law in this respect. So to hold would be inconsistent with the principle of numerous cases decided by the Privy Council. In the present case Kásam Pírbháí has always been a *Sunni*,

(a) 1 Ind. Jur., O. S., 1. (b) 6 Calc. W. Rep., Civ. R. 88.

but there is no law to prevent him changing his sect if he so pleases : *Barlow v. Orde* (c). *Muhammad Ibráhim v. Gulam Ahmed* (d) was also referred to. Under these circumstances, the court will set aside the Magistrate's order. The marriage contract was the groundwork of the jurisdiction of the Magistrate to make the order ; when that ceased to exist, the order *ipso facto* expired, and should be set aside. [WESTROPP, C.J. :—It is admitted on all sides that the order, as made by the Magistrate, was, at the time when it was made, a valid order. Being valid, the application to the Senior Magistrate to set it aside was wrong. He might have been asked to stay the execution of it. We have no power to quash or set aside a valid order ; but I understand that Mr. Green wishes to have the decision of the court on the merits of this case, and waives all objections to the form of the present application. We will, therefore, hear whatever evidence he desires to adduce in support of the custom he alleges on behalf of his client.]

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Several witnesses were then examined, from whose evidence it appeared that Kásam Pírbháí had been a *Sunni* Khojá for at least twenty-five years ; that the *Sunni* Khojás were not now allowed to resort to the original *jamát* of the Khojá community ; and that it was the custom for *Sunni* Khojá husbands, both before and since the secession of the *Sunni* Khojás, to divorce their wives according to the *Sunni* law, and to register such divorces in the Kázi's Court. Seven instances were given of divorces so registered, and it was stated that there were others.

WESTROPP, C. J. :—We are of opinion that the validity of this divorce has been established. This man no longer belongs to the larger branch of the Khojá community, who have excommunicated him and many others in the same position. That cannot, however, deprive him of the benefit of the general Muhammadan law ; and by that law a husband has the right to divorce his wife. It may be that that right amongst Khojás is limited by the necessity of

(c) 13 Calc. W. Rep., P. C. 41.

(d) 1 Bom. H. C. Rep. 236.

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obtaining the consent of the husband's *jamát*. We give no opinion upon that point, for the applicant here has obtained the consent of the *jamát* to which he belongs. The consent of the other *jamát* he could not obtain, for it would have nothing to say to him. He is now a *Sunni*, and has been so for many years. For five and twenty years he has been known to belong to that sect. The fact—whether it be true or not—that his wife belongs to the other sect, cannot deprive him of his right to divorce her on obtaining the consent of the only *jamát* to which he can have recourse.

Having then validly divorced his wife, Kásam Pírbhá'i is no longer liable, under the order made upon him on the 28th of March 1870, under Act XLVIII. of 1860, Sec. 10, to pay a monthly sum of Rs. 25 for the maintenance of his wife. That was a proper order at the time it was made, but we think the groundwork of that order has now been removed, and we cannot consider it any longer a continuing binding order upon the applicant. The enactment, under which that order was made, was introduced into an Act passed in amendment of the Presidency Towns Police Act (XIII. of 1856), applicable to the Presidency Towns alone. Sec. 10 of the amending Act (XLVIII. of 1860) does not relate more especially to Muhammadans than to Hindús, Buddhists, Indo-Britons, Europeans, or any other branch of the general community, and the Legislature could never have intended by it to interfere with or restrict the Muhammadan law of divorce. Whether the applicant has tendered to his wife upon the divorce all that he ought to have given, or that she was entitled to receive from him, by way of dower or otherwise, is a point that has not been raised before us; if disputed, it must form the subject of a separate suit to recover; but, no doubt, the respective solicitors of the parties will be able to arrange that matter.



On the question that is before us, we say that we do not think that the Magistrate ought to issue an attachment upon, or otherwise to execute, the order, it being in fact *functus officio*. We do not, however, quash or set aside the order, it having been a valid order when made; but we do what

both parties expressed their wishes that we should do, namely, express our opinion as to its continuing force: and we declare that in our opinion the order ought not to be any further executed. There will, of course, be no costs given on either side.

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There being no dispute as to the proper amount of the dower, it was by consent ordered that Rs. 490, less the several sums paid since the divorce (namely), Rs. 250, should be paid to Hírbái's solicitor for her.

Attorney for Kásam Pírbhái: *O. Tyabji*.

Attorney for Hírbái: *G. S. Lynch*, Acting Attorney for Paupers.

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REG. V. MOROBA' BHA'SKARJI.

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July 18.

*Criminal Intimidation—Threat of Injury—Ind. Pen. Code, Sec. 503.*

Where the accused went to the complainant, the brother of an adult woman, and told him that he had come from the Sarkár and would get him six months' imprisonment if he (the complainant) did not let his sister go:

*Held* that these words did not constitute either criminal intimidation, within the meaning of Sec. 503 of the Indian Penal Code (there having been no threat of an *injury* in the sense of the Code), or any other offence known to the law.

Where there is anything peculiar in the circumstances of a case, a criminal appellate court should notice it, even when such court confirms the conviction by the court which tried the accused.

THIS was an application for the exercise of the court's extraordinary criminal jurisdiction.

It was heard before KEMBALL and WEST, JJ.

*Pándurang Balibhadra* for the accused.

*Dhirajlál Mathurádás*, Government Pleader, for the Crown.

The judgment of the court was delivered by

KEMBALL, J.:—The accused in this case was convicted, by a First Class Subordinate Magistrate in the Ahmedábád District, of criminal intimidation, under Sec. 506 of the Indian Penal Code, apparently for having gone to the complainant, and, with the purpose of making him release his (com-

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plainant's) sister, a woman thirty years of age, who was being detained in the house, told him that he had come from the Sarkár and would get him six months' imprisonment if he (complainant) would not let his sister go. The reasons for the finding were thus set forth:—"The charge against the accused No. 3, Morobá Bháskarji, is held proved by the evidence of the witnesses, and, as he was punished before, he is convicted;" and the accused was then sentenced to undergo rigorous imprisonment for six months. Morobá appealed to the Magistrate of the District against the conviction and sentence, who rejected the petition with these remarks:—"There is no ground for interfering with the conviction and sentence passed by the Subordinate Magistrate;" and the case now comes before this court upon an application for the exercise of our extraordinary jurisdiction, on the ground that the act charged, if proved, did not constitute an offence under the section quoted.

Having heard the Government Pleader in support of the conviction, we are clearly of opinion that it cannot be sustained. To convict a man of an offence *because* "he was punished before" is obviously illegal; and to say simply that a charge "is held proved by the evidence of the witnesses" does not satisfy the requirements of Sec. 429 of the Criminal Procedure Code. Taking it, however, to be proved that the accused did threaten the complainant with a criminal prosecution if he persisted in detaining his sister in his house, we consider that that act did not constitute either "criminal intimidation" (there having been no threat of an *injury* within the meaning of the Penal Code), or any other offence known to the law. We, therefore, reverse the conviction and sentence.

Before leaving this application, we think it necessary to observe that though, as a general rule, it is not incumbent on an appellate court, when confirming a decision appealed against, to set forth its reasons in full, the circumstances of the present case were such as to require something more at the District Magistrate's hands than the slender and summary notice recorded.

## REG. V. ALIBHA'I MITHA'.

1871.  
June 15.

*Evidence—Conditional Pardon—Confession—Admissibility of Confession in Evidence—Act II. of 1855, Sec. 32—Crim. Proc. Code, Secs. 209 and 210.*

A conditional pardon was tendered to and accepted by the accused. He then, on solemn affirmation, made a statement before the committing Magistrate in which he criminated himself and two other persons. Three days afterwards he voluntarily came forward and made, on solemn affirmation, another statement, in which he retracted and contradicted what he had said in his former statement. The conditional pardon was thereupon cancelled, and the accused was put upon his trial.

*Held* that the first statement was admissible as evidence against the accused, under Sec. 32 of Act II. of 1855.

THE accused—a Bohrá of the Broach Collectorate—was tried, on a charge of murdering his own mother, by W. H. Newnham, Session Judge of the District of Súrat. He was convicted and sentenced to death.

The facts of the case, as found proved by the Session Judge, were these.

The accused, Alibháí, and his family were on terms of enmity with one Umar Vali and his family. There was an affray between the two families, and Gori, the mother of the accused, was slightly wounded on the head. By whom or how this wound was inflicted was not clear; but for treatment of this wound she was admitted into the Civil Hospital at Broach, where, after remaining for three days, she died. Shortly after her death, the accused, Alibháí, complained to the Magistrate F. P. that she had been killed by the beating inflicted upon her by their enemy Umar Vali and his associates, against whom criminal proceedings were, accordingly, taken, but they were ultimately discharged; and the accused was himself charged with the murder.

The Session Judge further held that it was proved that the cause of the woman Gori's death was arsenical poisoning, and not any external injury; that during her residence in the Broach Hospital some food was supplied to her by the accused; that there was every reason to believe that that food contained poison, and that the accused had knowledge that that was the fact.

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On arriving at his conclusion on this last point, the Session Judge observed that without the accused's own statement he should hesitate to convict him. This statement was that the accused first intended to make a charge of simple assault against Umar and his friends, but that at the instigation of his own comrades he poisoned his mother and charged Umar and his friends with murder. The statement and its withdrawal took place under the following circumstances :—

During a preliminary investigation before the committing Magistrate into the conduct of three persons suspected in this matter, the Superintendent of Police in charge of the case suggested that a conditional pardon should be tendered to the accused, Alibhai. This was done, and Alibhai, being examined as a witness on solemn affirmation, made the statement alluded to above, on the 24th of March 1870. Three days afterwards, Alibhai appeared before the Magistrate of his own accord, and, also on solemn affirmation, made another statement, in which he denied all that he had said before, and asserted that he had been induced to make the first statement by the persuasions of his enemies. His pardon was thereupon cancelled, and he was committed for trial.

At the trial it was objected, when it was proposed to put in evidence the prisoner's first statement, that it, being upon solemn affirmation and made as a witness, was not admissible in evidence against him except for purposes of a trial for giving false evidence. The Session Judge upon this objection ruled as follows :—

“Sec. 32 of Act II. of 1855 runs as follows :—‘No such (criminating) answer which a witness shall be compelled to give, shall, except for the purpose of punishing such person for wilfully giving false evidence upon such examination..... be used as evidence against such witness in any criminal proceeding.’

“I have not been able to find any ruling of the Bombay High Court on this privilege with regard to approvers; but there is a ruling quoted from the Calcutta Weekly Reporter in Prinsep's Procedure Code—a criminal letter, in the case

of *Reg. v. Radanath Dossadh (a)*—declaring that a statement made under promise of pardon is *not* admissible against the accused. This does not, however, refer to the above section of the Evidence Act, but says that to admit such would be contrary to the policy of Sec. 203 of the Code of Criminal Procedure. The judgment on the case in appeal, however, (8 Calc. W. Rep., 53 Cr. R.) bears the name of one Judge only; and as Sec. 209 is specially excepted in the above-quoted Sec. 203, and this question arises from proceedings under Sec. 209, I am doubtful as to the soundness of the decision.

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“First, with regard to the words of the section of Act II. of 1855, the question is, Was this a statement which the witness was *compelled* to give? On behalf of the accused it may be urged that compulsion arises from the solemn affirmation, under Sec. 179 of the Penal Code, which is quoted in note to Sec. 32 of Act II. of 1855 in West's Code. But I do not consider that there was compulsion in this case from the fact of the evidence being given, as by law demanded, on solemn affirmation. The accused had in the first instance agreed, on receiving a conditional pardon, to make a ‘full, true, and fair disclosure’ of all the circumstances connected with the crime: and the affirmation could not create any stronger obligation after he had so agreed.

“With regard to the constraint or compulsion implied by an oath, Taylor, Vol. I., p. 797, 5th ed., Sec. 821, says: ‘If a prisoner, on being examined *as a witness*, has consented to answer questions to which he might have demurred, as tending to criminate himself.....his statement will be deemed voluntary, and, as such, may be subsequently used against him,’ &c. Now in this case the accused had, *before* he was made a witness, consented, under his conditional pardon, to *make a full disclosure*, irrespective of the obligation of the solemn affirmation, and he might have refused to become an approver altogether. I apprehend, then, that after such consent his evidence was, and remained, voluntary; that it

(a) 8 Calc. W. Rep., 14 Cr. Letters.



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did not become compulsory because made on solemn affirmation; that Sec. 32 of Act II. of 1855 is designed not to protect approvers (who have a conditional protection beforehand), but ordinary witnesses who may have to answer criminating questions; and that it does not exclude this evidence.

“Secondly, as above said, I cannot see that Sec. 203 of the Code of Criminal Procedure excludes this evidence—see Goodeve on Evidence, 596: ‘Were the inducement held out conditional on some act to be done by the accused himself, and he to break the condition, this would be tantamount to a forfeiture of the protection implied in the inducement, and leave the confession admissible;’ and the example given is the case of ‘King’s evidence.’

“My attention has been drawn to Russell on Crimes, Bk. VI., Ch. V., Sec. VI., on Accomplices (Vol. III., 4th ed., p. 596), &c., where several cases are quoted. (Note v, p. 598.) Among these is *Reg. v. Holtham and five others* (1843), ‘where an “accomplice,” who had made a full disclosure of the fact ..... before the committing Magistrate, refused before the Grand Jury to give any evidence at all. Wightman, J., ordered his name to be inserted in the bill of indictment, and he was *convicted on his own confession*.’ This last is a very strong case in point.

“But it might be objected that the statement is excluded (irrespective of Sec. 32 of the Evidence Act) by its having been made on solemn affirmation. On this subject Goodeve again says, p. 597: ‘It has been questioned, indeed, whether in any case in which an examination has been taken on oath it would be admissible;.....the better opinion, however, is that there is no weight in the objection; and undoubtedly there are many cases in which it has not been adhered to.’ See also Taylor, Secs. 818, 819.

“Lastly, if it be urged that the accused, pardon having been withdrawn, is placed in a worse position than before, by admitting against him what he has said under promise of pardon, I reply that it is his own doing; he has broken

faith with the Crown, and has no possible claim to be replaced in the *status quo antè*, either on grounds of justice or public policy.

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“For the above reasons, I consider it clear that the evidence in question should be admitted for what it is worth.”

Having thus disposed of the point as to the admissibility of the accused's statement, the Session Judge reviewed the other evidence in the case, and convicting the accused, Ali-bháí, passed sentence of death upon him, subject to the confirmation of the High Court.

In the High Court the case was heard by GIBBS and WEST, JJ.

*Girdharlál Dayáldás*, for the convict, objected to the admissibility of his statement.

*Dhirajlál Mathurádás* (Government Pleader) appeared for the Crown, but was not called upon to reply.

PER CURIAM:—The trial of this case being in other respects regular, the prisoner's statement was admissible in evidence. A confession improperly obtained—that is, by means of hopes and fears, caused in ways disapproved by the law—is rejected as evidence. But in this case no improper means were resorted to; nothing was done but what the law distinctly approves: and the prisoner, having voluntarily become a witness, is subject, like other witnesses, to have what he said in that capacity used against himself. The law on the subject of criminating questions is not in the satisfactory state which it may be hoped it will shortly assume, but it is sufficiently clear that the proper connection of Sec. 32 of Act II. of 1855 and of Sec. 179 of the Indian Penal Code is this—that the former establishes an obligation to answer all questions put by a competent authority, while the latter provides a specific penalty for failure in the prescribed duty. That duty is in part assumed as existing, and in part defined by the earlier enactment, and, where defined, defined on the assumption, to be clearly gathered from the proviso, of an exercise of compulsion by the court, which can have

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no place where the whole statement is made without reluctance and without protection being claimed.

The provisions in Secs. 209 and 211 of the Code of Criminal Procedure assume that guilty persons may make statements under conditional pardons and be afterwards committed for trial. The ordinary rule is that everything from which a reasonable inference can be drawn as to the facts in issue is evidence, and if it had been intended that this particular kind of evidence should be inadmissible, a clause to that effect would have been inserted in the Code. The law protects an informer who tells the truth; one who perverts it deserves no protection. And if the former of the prisoner's two statements in the case was the false one, it places him in no worse position than any other accused person who without lawful excuse has made a false confession.

The only case cited at the bar against this position is *Reg. v. Radanath Dossadh (b)*. This was more a dictum than a regular decision arrived at after argument. Mr. Justice Kemp, who was the only sitting Judge in that case, observed: "The statement made under the promise of pardon is no evidence against the prisoner. To admit such would be contrary to the policy of Sec. 203 of the Code of Criminal Procedure, as observed by the Judges of this court on review of the jail delivery statements." With due deference to the opinion of the learned Judge, we think the admission of the statement in question is opposed neither to the policy of the section quoted, nor to the interests of justice. We are confirmed in our opinion by the alteration effected in this section by the Criminal Procedure Amendment Act of 1869, two years after the decision of the above case in 1867. Before amendment Sec. 203 ran thus: "No influence, by means of any promise or threat or otherwise, shall be used," &c.; now, the most important words, "except as provided in Section 209," are placed prominently at the commencement. The prisoner, without any pressure having been put upon him, came forward and

(b) 8 Calc. W. Rep., Cr. R. 53.

made his statement before the Magistrate; and we must, therefore, take it to be perfectly voluntary. We do not think that the circumstance of its having been made on solemn affirmation renders it invalid. On this point Taylor, in Sec. 820, p. 795 (5th ed.), says: "And, indeed, the rule excluding sworn confessions seems strictly confined, at Common Law, to the case of a statement made by the party upon oath *while a prisoner under examination* respecting the criminal charge. It is true that one or two decisions by Mr. Baron Gurney might be cited which seem to extend the rule somewhat further, and to render inadmissible confessions made on oath to magistrates or coroners by parties who, after being examined *as witnesses*, have themselves been committed for trial; but the authority of these decisions has been much shaken by subsequent cases, and they cannot now be safely relied upon as law."

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The statement made by the prisoner being thus admissible, we are of opinion that that alone is a sufficient foundation on which to base a conviction of murder. In this case there is ample corroborative evidence to establish the prisoner's guilt. We shall, therefore, uphold the conviction, but, declining to confirm the sentence of death, pass upon him a sentence of transportation for life.

*Note.*—The two following cases are inserted here in explanation of the circumstances under which the murder in the above case was committed. The facts appear in the judgments of the Court.

#### REG. v. MUHAMMAD VALLI.

22nd September 1871. GIBBS, J. :—The prisoner is charged with the murder of his sister, and this forms one of the three cases which have arisen out of the party feuds in the village of Karmár, in the Broach District, the general history of which will be found in the court's judgment in the case of Muhammad and Husan A'manji (see next case).

The principal witness in this case is the Pársi cloth-seller Rastamji, whose evidence appears to have been given in a straightforward, truthful manner, which impressed both the Session Judge and the assessors with the feeling that he was a witness to be believed. According to this man's statement, he was standing talking with the prisoner's father on business, when his attention was drawn to the prisoner by hearing a woman exclaim "Why do you kill me for other people?" and, on looking towards

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the spot whence the voice came, saw the prisoner strike the girl on the head with an axe, which caused her death.

It appears that two wounds were inflicted, but that the Pársi witness only saw one actually struck. After striking the blow the prisoner dropped the axe on the spot, struck his own head violently against a neighbouring door, so as to cause the blood to flow, rushed off, mounted a pony and rode away. The Pársi and the girl's father then went up to the spot, and the father cried over the corpse.

The Pársi's evidence is corroborated by that of two men who were close by, engaged in pounding *chunám*. Their attention was called by hearing some one exclaim "Why kill me?" or some like expression, and hurrying into the street were in time to see the second blow struck.

These three witnesses were cross-examined, but their evidence was not shaken, and, as above stated, it was believed by both the Session Judge and the assessors, and we see no reason for arriving at any other conclusion.

The defence set up by the prisoner before the committing Magistrate, but in proof of which no evidence was offered, was that a quarrel had occurred, regarding the building of a wall opposite his house, with Husan A'manji and Bápu A'manji, and that they came with others, armed with picks and axes and killed his sister. Before the Session Court he for the first time added that the case against him had been got up by Kávaahá, the inspector of police, who at the time the prisoner made this statement was under suspension on some charges of bribery; but the manner in which the statement was made, and the absence of any evidence offered to support it, renders it unworthy of further notice.

We, therefore, are unable to arrive at any other conclusion than that the prisoner was his sister's murderer: and, such being our opinion, we cannot do otherwise than confirm the capital sentence, which should be carried out into execution at the scene of the murder.

#### REG. v. MUHAMMAD A'MANJI and HUSAN A'MANJI.

26th Sept. 1871. GIBBS, J.:—In this case, the prisoners have been convicted of attempt to commit murder, and have been sentenced—No. 1 to transportation for life, and No. 2 to transportation for ten years.

The evidence certainly is quite insufficient to maintain the conviction against prisoner No. 2, Husan. There is nothing against him as regards the assault on his mother; he remained outside the front of the house, and whatever was done to the old woman in the yard at the back was done by prisoner No. 1, Muhammad, and it is this which requires particular attention.

The evidence shows that a murder had been committed in the village of Karmár on the morning of the 5th of May (*Reg. v. Muhammad Valli*), and from cases which have lately come before the court it appears that there are two factions in this village, and that murders have been committed on each side—not, as would be naturally expected, by members of one faction on a member of the other, but by members of one faction on

a helpless female of their own, so as to throw either the guilt of blood or the blame of the crime on the other party.

Such a state of things is hardly credible, but this is an instance of truth being stranger than fiction, as will be seen by the following statement of facts, derived from three cases lately before the court.

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From *Reg. v. Alibhái Mithá* it appeared that some members of the two factions in this village had a fight, or rather scuffle. On one side was Alibhái, his wife, mother, daughter, and others; on the other side the police pátil and his wife, one Jivá Alibaksh and his sons and another. The result of this scuffle, which arose from a quarrel between Alibhái's daughter and Jivá's son, was that on the side of the latter one of the men got a blow on the head and was taken into Broach. The evidence then shows clearly, and the prisoner admitted, that a consultation was held by his party, and it was determined to break or bruise the head of the old mother and take her into Broach, as a sort of make-weight against the broken head on Jivá's side.

The old mother was apparently a consenting party, and by a heavy clod of earth thrown at her head the desired effect was obtained, and she was carried in due form to the Broach Hospital, and a complaint laid against the police pátil and Jivá's party.

Now comes the most extraordinary step. While the old woman was in the hospital, the leaders of her son's party and her son determined that it was necessary to have a death to score on their side,—why is not clear, but one of the two causes above mentioned seems to have led them to this determination. The son and the others then, it is said, prepared some food with arsenic, which was given to the old woman at her evening meal by one or more of these persons. She ate it, went to sleep, and in about half an hour woke up and vomited violently—so violently as to bring on rupture of the spleen, from which she at once died. The *post-mortem* examination and the chemical analysis proved the cause of death.

The evidence was, unfortunately, insufficient to bring home the guilt to all the parties, but the son was on his own statement convicted of murder, and the High Court upheld the conviction.

The next step which occurs is that which is treated of in the case of Muhammad Valli for the murder of his sister Fattá. The evidence showed that the brother brought his sister out of the house, and as she was leaning against the wall struck her twice with an axe and killed her. She is said to have exclaimed, "Why do you kill me for other people?" The brother then dashed his own head against the wall, wounding it severely, and mounting a pony rode off. His brother then went to the Magistrate's camp and gave information that his sister had been killed by the opposite faction. The Session Judge and assessors convicted the prisoner, and he has been sentenced to death, and this court has confirmed the sentence.

Immediately after the poor girl's murder the prisoners in this case, who apparently belong to the opposite faction, came out calling for justice, and saying their house had been attacked. The Pársi cloth-seller, the only independent witness, told them not to attack the pátil's house, as he would

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depose to how the girl was killed. But it appears they became frightfully excited, and prisoner No. 1, Muhammad, expressed his intention, evidently as a set-off against the girl Fattá's death, to kill himself. On this his old mother begs that she might be the victim instead. Now comes the assault. It appears the mother and her son prisoner No. 1 went through their house to a back-yard, and presently the prisoner No. 1 rushed out of the house calling for the police pátíl, who, it appears, had just returned to the village, to come and take his mother's deposition, and at the same time, showing a wound on his chest. Some little delay occurred, and when the police went inside they found the old woman senseless on a cot, and the prisoner, lying wounded in the chest, on another.

They were taken to Broach Hospital, and the evidence of the Civil Surgeon (the late Dr. Glen) shows that the wounds of the old woman were considered by him slight. She stayed in hospital fifteen days and then returned to her village, whence her corpse was brought back to the hospital about six days after. Dr. Glen certified that "these wounds did not bring about the death of the woman : she died of old age ;" and in his deposition before the Session Court he maintains the same view. The old woman herself also stated in her deposition that her wounds were not severe.

Under these circumstances it is impossible to uphold the conviction for attempt to murder, nor can the court record a conviction of grievous hurt, for the facts do not bear out the necessary definition in the Indian Penal Code. All we can do is to say the evidence proves a charge of causing hurt, but, as the same evidence shows that what was done was done with the old woman's consent, the provisions of Sec. 87 of the Indian Penal Code prevent the act from being regarded as an offence.

In two out of the three cases mentioned in this minute, the conduct of Dr. Glen, the late Civil Surgeon of Broach, was such as would have rendered it necessary for the court to bring it to the notice of Government. The great delay and carelessness in forwarding the contents of the stomach and the vomit in the case of Alibháí Mithá, together with the imperfect manner in which he appears to have examined the bodies, and the unsatisfactory nature of his evidence regarding the wounds, were such that we had determined to recommend to Government his removal from his appointment, when the newspapers announced his death on his way to England. No further notice, therefore, need now be taken of this portion of the case.

*Convictions and sentences reversed.*



## REG. V. JA'FAR ALI'.

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Aug. 11.

*Complaint upon Oath—Issuing of Warrant upon Complaint—Report of Police Officer—Offence for which the Police cannot arrest without Warrant—Crim. Proc. Code, Secs. 66 A and 155.*

In cases in which the police cannot arrest without a warrant, a warrant cannot be legally issued by a Magistrate except on a complaint made upon oath (or under the provisions of Sec. 68), whether the Magistrate issuing the warrant is authorised to entertain cases either on complaint preferred directly to himself, or on the report of a police officer, under Sec. 66 A of the Criminal Procedure Code or not.

The report of a police officer referred to in the above section means, not any communication made by a police officer, but the formal report drawn up under Sec. 155 of the Criminal Procedure Code, in cases in which the police may arrest without warrant.

THE accused, Jáfar Alí, was convicted by Major T. E. Britten, a Railway Full-Power Magistrate in the Khándesh District, of dishonest misappropriation, under Sec. 403 of the Indian Penal Code, and sentenced to rigorous imprisonment for three months.

On appeal, A. C. Watt, Assistant Session Judge of Khándesh, annulled the conviction and sentence, on the ground that the proceedings of the Magistrate F. P. were illegal, as they were held without a complaint, as required by Sec. 66 of the Criminal Procedure Code. The following was the finding of the Assistant Session Judge :—

“In this case the appellant has been convicted of an offence punishable under Penal Code Sec. 403, which is an offence for which arrest cannot be made without warrant. In the vernacular papers there is a warrant signed by the Magistrate F. P., Major Britten, which is dated February 25th, 1871, and in which it is stated that a complaint had been made. There is no document of the nature of a complaint made to the Magistrate F. P. in the proceedings, and, as far as can be gathered from them, the complainant did not appear before the Magistrate F. P. till February 27th. The Magistrate F. P. is, therefore, called upon to send into this court and to certify the complaint upon which he issued his warrant (Crim. Proc. Code Secs. 66 and 248), and if no such complaint were made before him, to explain under what provision of the Law the warrant was issued. The



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Magistrate's proceedings, as received by this court, are returned for reference."

The Magistrate stated in reply that the warrant had been issued on a complaint made by the police, and not by the complainant. The Session Judge thereon passed the following final order in the case, on the 4th of May 1871 :—

"I annul the conviction and sentence passed upon the appellant, as I consider that without a complaint made to the Magistrate on solemn affirmation he had no jurisdiction. He had no right to issue the warrant, and the proceedings were illegal *ab initio*. The cases" (a) "reported in Bombay High Court Reports, Vol. IV., Crown Cases, pages 30 and 33, seem to support my decision, as also the case in Vol. V., page 29, Crown Cases" (b).

The Assistant Session Judge afterwards, considering that his decision annulling the conviction and sentence was wrong in point of law, submitted the original and appeal proceedings in the case for the orders of the High Court with the following observations :—

"I have the honour to submit for the orders of their Lordships the original and appeal proceedings in the case of *Reg. v. Jafar Ali*, as I have very recently had reason to believe that my decision on the point of law, annulling the conviction, is incorrect, and I may have misled the Magistrate thereby.

"Under Sec. 66 A of the Criminal Procedure Code as amended by Act VIII. of 1869, it appears that Major Britten, the Magistrate F. P., had power to entertain the case on the report of a police officer were he specially empowered to do so, and I find from page 823 of the *Government Gazette* dated 15th July 1869 that Major Britten was so empowered. Had Major Britten only told me this when I made the first reference to him, I should probably have avoided the mistake which I believe I have made."

The reference was considered by the Judges in chambers, and the following letter was by their order addressed by the

(a) *Reg. v. Dipchand Khushál; Reg. v. Vishranáth Daulatró.*

(b) *Reg. v. Sadáshiváppá Pándurangáppá.*

Registrar of the High Court to the Session Judge:—

“ I am directed to inform you, in reply to your letter No. 837, dated the 21st ultimo, that the Honorable Judges do not clearly understand the reason of your reference.

“ As far as can be judged from the proceedings, your decision of the 4th of May 1871 was perfectly right. The case was one in which the police might not arrest without warrant, and a warrant could not be legally issued except on a complaint made upon oath.

“ The fact that Major Britten was empowered, under Sec. 66 A of the Criminal Procedure Code, to entertain cases ‘ on the report of a police officer,’ does not appear to their Lordships to affect the question. By the words ‘ report of a police officer,’ used in that section, are intended, not any communication made by a police officer, but the formal report forwarded to the Magistrate under Sec. 155 in cases in which the police may arrest without warrant.”



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Aug. 24.

*Alternative Charge—Offences punishable under Enactments other than the Ind. Pen. Code—Crim. Proc. Code, Sec. 242—Jurisdiction—Reg. XVII. of 1827, Sec. 16.*

In order to make an alternative charge of two or more offences regular under Sec. 242 of the Crim. Proc. Code, the offences specified in such alternative charge must all be offences against the Indian Penal Code. Therefore, a charge against a prisoner either of “ criminal breach of trust” under Sec. 409 of the Indian Penal Code, or of “ undue exaction of money” under Sec. 16 of Reg. XVII. of 1827, is irregular.

An offence under the latter section, being punishable by imprisonment for seven years, is triable exclusively by a Court of Session, under the provisions of the Schedule of the Code of Criminal Procedure Amendment Act (VIII. of 1869), last page.

ON the 31st of May 1871, the accused, A'jam Dullá and Narbhárám Ganpatráam were convicted by F. Birkbeck, Magistrate F. P. in the Súrat District, on an alternative charge of the offence either of criminal breach of trust as public servants, under Sec. 409 of the Indian Penal Code, or of unduly exacting money under colour of the authority of revenue officers, under Sec. 16 of Reg. XVII. of 1827, and were each

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sentenced to rigorous imprisonment for a period of six months and to pay a fine of Rs. 75, or in default to suffer further rigorous imprisonment for one month. The Magistrate F.P. passed the above sentence under Sec. 16 of Reg. XVII. of 1827 (a), as he considered that that section provided a lighter punishment than Sec. 409 of the Penal Code.

A'jam Dullá and Narbhárám Ganpatráam were respectively *pátíl* and *taláti* of the village of Moticher in Mándvi. The facts on which the prosecution relied were as follow :—On the 30th of December 1870 the accused sent for one Dhotáro Beláro and informed him that he must pay Rs. 7-8-0 on account of the toddy drawn by him from the date-trees growing on his land. Dhotáro, accordingly, thinking it to be a Government demand, paid the money, giving Rs. 6 to the *taláti* and Rs. 1-8-0 to the *pátíl*.

On appeal the Session Judge of Súrat (W. H. Newnham) confirmed the conviction and sentence passed by the Magistrate F. P.

A'jam Dullá thereon presented a petition to the High Court in the exercise of its extraordinary criminal jurisdiction. The record and proceedings in the case were sent for, to consider their legality. The High Court also reviewed, *motú proprio*, the conviction of, and sentence passed upon, the second prisoner, Narbhárám Ganpatráam.

The petition of A'jam Dullá was heard before MELVILL and KEMBALL, JJ., on the 24th of August 1871.

*Nánábhái Haridás*, for the petitioner :—Under Sec. 243 of the Criminal Procedure Code, an accused person can be tried on alternative charges only when the offences alternatively charged are offences under the Indian Penal Code.

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(a) Reg. XVII. of 1827, Sec. XVI., cl. 1 :—“ All undue exactions made under the colour or by the exercise of the authority of any revenue officer are hereby declared criminal offences, and may be prosecuted criminally: they shall be punishable by imprisonment for a period not exceeding seven years, and a fine not exceeding ten times the amount of the undue exaction. commutable into a further period of imprisonment at the rate of two days of imprisonment per each rupee of fine.”

In the present case one offence was under the Penal Code, and the other under Sec. 16 of Reg. XVII. of 1827. This was an error of law on the part of the Magistrate.

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Under Reg. XVII. of 1827, Sec. 16, under which the sentence against the accused A'jam Dullá is passed, the offence is punishable by imprisonment for a period not exceeding seven years. By the amended Schedule of the new Criminal Procedure Code, offences against other laws than the Indian Penal Code for which the punishment is imprisonment for seven years are triable exclusively by a Court of Session. The present case, therefore, was one which was exclusively within the jurisdiction of the Session Court.

*Dhirajlál Mathurádás* (Government Pleader) was heard in support of the convictions.

PER CURIAM :—The Court is of opinion that the alternative charge in this case was irregular, inasmuch as both the offences did not fall within the Indian Penal Code (Criminal Procedure Code, Sec. 242) (b), and with regard to the offence of which the appellate court has considered that the prisoners were properly convicted, namely, an undue exaction under Sec. 16, Reg. XVII. of 1827, the Court is of opinion and decides, with reference to the last page of the amended Schedule of the Criminal Procedure Code, that such an offence, being punishable with imprisonment for seven years, is not cognisable by a Magistrate, but by the Court of Session only. On this ground the Court annuls the convictions and sentences, and orders that the accused persons be committed for trial before the Court of Session.

*Convictions and sentences annulled.*

(b) Sec. 242 :—" When it appears to the Magistrate that the facts which can be established in evidence show a case falling within some one of two or more sections of the Indian Penal Code, but it is doubtful which of such sections will be applicable, or show the commission of one of two or more offences falling within the same section of the said Code, but it is doubtful which of such offences will be proved, the charge shall contain two or more heads framed respectively under each of such sections, or charging respectively each of such offences accordingly.

1871.  
August 29.

REG. v. LAKHU valad SAKRU.

*Jurisdiction—Opium Laws, Offences against—Smuggled Opium, Possession of—Reg. XXI. of 1827, Secs. 4, 7, and 10—Crim. Proc. Code, Sec. 21.*

The offence of unlawfully being in possession of smuggled opium is an offence exclusively cognisable by a Magistrate of a District or of a division of a District, as representing the Zillá Magistrate referred to in Reg. XXI. of 1827, Sec. 7. No other Magistrate or Court has now jurisdiction to hold a preliminary inquiry into, or to try a person accused of, such an offence.

*Reg. v. Hírá Jivá (a)* approved, and the Court's reply, No. 1231 of 19th August 1867, to the Khándesh Session Judge's reference No. 702 of 1867, dissented from.

THIS was a reference made by A. C. Watt, Acting Session Judge of Khándesh, to the following effect :—

“ With reference to the ruling of the Bombay High Court reported in Vol. VII., p. 59, Crown Cases, I have the honour to submit for the orders of their Lordships the accompanying proceedings of a case committed for trial by this court at the ensuing sessions.

“ The accused has been committed for trial by Mr. Anderson, a Magistrate F. P. in this district, charged with an offence punishable under Reg. XXI. of 1827. As Sec. 7 of that Regulation says that the penalty shall be enforced by information before the Zillá Magistrate or Criminal Judge, and as Mr. Anderson holds neither of these offices, it appears to me that he had not jurisdiction to commit the case to the Session Court.”

The reference was heard by GIBBS and WEST, JJ.

Neither side was represented.

WEST, J. :—In this case a Magistrate F. P. has committed, for trial by the Session Court, a man accused of being unlawfully in possession of opium. The Acting Session Judge has referred the case to this court with an expression of his opinion that as in cl. 1, Sec. VII. of Reg. XXI. of 1827, by which the jurisdiction in cases like the present is constituted, it is provided that the penalty shall be enforced by information

before the Zillá Magistrate or Criminal Judge, and as the committing Magistrate does not hold either of these offices, he had not jurisdiction to commit the case for trial before the Sessions Court.

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SAKRU.

Reg. XXI. of 1827 forms part of what was intended as a connected and complete system of legislation for this Presidency, and the true intention of any particular enactment can be arrived at only by a consideration of its place in the Code, and of those other provisions the existence and force of which must have been present to the mind of Government in framing it. Now Reg. XII. of 1827 was designed to establish "a system of police, and to define the duties and powers of all police authorities." "The duties of police," it is declared by Sec. 1, "as described in the Regulations, shall be conducted by the Judge and Collector of each Zillá, under the respective designations of Criminal Judge and Zillá Magistrate, in the manner hereinafter enacted." Sec. 2 limits the police jurisdiction of the Criminal Judge generally to the town in which his Court or *Adálat* is situated. This special police jurisdiction of the Criminal Judge was swept away by Reg. IV. of 1830 and Act V. of 1846. Reg. III. of 1830, simultaneously with Reg. IV., provided that "the criminal courts held by the Zillá Judges shall be held by them as Session Judges, and where in the Regulations functions and duties are provided for the Criminal Judges, the same shall be executed by the Session Judges as substituted for them." This is the origin in the Bombay Presidency of the office of Session Judge—an office divested, as we have seen, at the moment of its creation, of the local police jurisdiction that had belonged to the Criminal Judge under Reg. XII. of 1827.

The remaining functions of the Criminal Judge descended to the Session Judge. These were in general "the functions of criminal justice," which, according to the definition given in Reg. XIII. of 1827, Sec. 1., cl. 1, are "to conduct the trials of persons accused of crimes and serious offences, and to maintain adherence to Regulations made for the said purpose, and for the guidance of Magistrates and Police

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P.  
LAKHU SAKRU.

Officers in general." Such functions, forming the subject of a separate Regulation, were regarded as quite distinct from the duties of police, for the execution of which an entirely different set of officers is constituted by Reg. XII.—entirely different, that is, from the moment when the anomalous local police jurisdiction of the Criminal Judge had been extinguished by Reg. IV. of 1830.

Amongst the duties assigned to the Collector as Zillá Magistrate was that of receiving informations of offences; as to which it is provided that they "shall, if circumstances permit, be recorded in the form of depositions:" Reg. XII. of 1827, Sec. ix., cl. 1 and 2.

The Criminal Judge discharging the duties of police within the Sadr Station, as prescribed by Sec. 1 of the same Regulation, "in the manner hereinafter enacted," could receive and act on such informations relating to offences and offenders within the limited space assigned to him with magisterial powers, but not beyond it. When, therefore, we find in Sec. 7 of Reg. XXI. of 1827, a contemporaneous enactment, that "the penalty for abetting the smuggling of opium" "shall be enforced by information before the Zillá Magistrate or Criminal Judge according to the general Code," the process intended is obviously that the principal police authority (according to the sense attached to the term "police" in the Regulations) shall take cognisance of the breach of the Revenue Law. For laying an information before the Criminal Judge in his strictly judicial character no provision is made in the Code. It is true that in Reg. III. and also in Reg. IV. of 1830 it is provided that "the functions and duties" of the Criminal Judge shall be executed by the Session Judge, "and that a Session Judge has all the duties and functions of the Criminal Judge." These expressions taken by themselves would be comprehensive enough to include such a function as that imposed by Reg. XXI. of 1827, Sec. vii., cl. 1; but then they must be taken in connection with the express withdrawal by Reg. IV. of 1830 of the police jurisdiction up to that time exercised by the Criminal Judge. To take an information "according to the general

Code" was to exercise police jurisdiction, and became legally impossible when that jurisdiction was withdrawn. 1871.  
REG.

It thus appears that since the year 1830 it has been necessary to read cl. 1, Sec. VII. of Reg. XXI. of 1827 as though the words "or Criminal Judge" had been struck out of it: the penalty then must be enforced by information "before the Zillá Magistrate." The sections of Reg. XII. of 1827 defining the Zillá Magistrate are no longer in force, but it has been held on several occasions in this court that when powers are given to the Zillá Magistrate alone they can now be exercised only by the Magistrate of the District (3 Bom. H. C. Rep., Cr. Ca. 39, 50), and there is no room for doubt that "Zillá Magistrate" in the Regulations meant everywhere and always the Collector in the exercise of his magisterial functions. These functions he could, and as to opium cases usually did, devolve on his Assistants under Reg. XII. of 1827, Sec. III., cl. 3; but the repeal of that clause by Act XVII. of 1862 has thenceforward made such delegation illegal. The District Magistrate must himself receive the information. LAKHU SAKRU.

It was perhaps permissible to the Magistrate under the Regulations, though he had received the information, to commit an offender against an opium law for trial to the Court of the Criminal Judge (now the Court of Session). It is true that the English books lay down that "when a statute creating an offence gives a penalty and directs how it shall be recovered, the offence cannot be punished in any other way" (Cro. Jac. 643), and that a particular mode of proceeding prescribed in the case of a new offence must be strictly pursued: *Reg. v. Wright (b)*. The doctrine, after having been shaken in *Crofton's Case*, was reaffirmed by Lord Mansfield (see the cases collected in 1 Russell on Crimes, 50), and has not since been questioned. But in the classification of acts given in Sec. 1 of Reg. XIV. of 1827 as to be considered "criminal" according to the heading of the chapter, Art. 6 includes "acts which constitute breach of laws made for particular purposes," and Sec. 12 of Reg. XII. of 1827 allows

(b) 1 Burr. 545.



1871. the Magistrate, in the case of any trial of an offender in which  
 REG. he finds his powers of punishment inadequate, or that the  
 v. offence is one which ought to be referred for trial to the  
 LAKHUSAKRU. Criminal Judge, to commit the case for trial accordingly. Such cases arising out of the smuggling of opium could hardly, according to the distinction made by Reg. XIII. of 1827, Sec. 1, be considered as "crimes and serious offences" properly referable for trial to the Criminal Judge. Even if they could sometimes be placed in this category, commitments would necessarily be very infrequent after the Magistrate's power of inflicting imprisonment had been extended to a year by Reg. IV. of 1830. He has now jurisdiction (Act XXV. of 1861, Sec. 22) to inflict the extreme term of imprisonment authorised by Reg. XXI. of 1827, Sec. VII., cl. 1, to be inflicted in commutation of the penalty. It was only under the particular circumstances set forth in Sec. 12 of Reg. XII. of 1827 that he could, after entering on the trial of an opium case under Sec. 7 of Reg. XXI., transfer the trial to the court of the Criminal Judge. Sec. 12 of Reg. XII. of 1827 having now been repealed by Act XVII. of 1862, such a transfer is no longer allowed by the law. He must hear and determine the case himself, since in any other Criminal Court the objection might be raised that a breach of the opium regulation, as the law now stands, ranks amongst "offences which are by such law made punishable by some other authority therein specially mentioned" (Act XXV. of 1861, Sec. 21).

The view just expressed has been taken by this court on several previous occasions. The last of these amongst the published reports is that of *Reg. v. Hirá Jivá (a)*, in which it is distinctly laid down that "no other authority (than the Magistrate of the District) has jurisdiction." The point immediately before the court on that occasion was as to whether a Subordinate Magistrate, 1st Class, had jurisdiction; but the principle extends to the present case. It is before the District Magistrate's alone, of existing courts, that the penalty can be now enforced in the mode prescribed by

(a) 7 Bom. H. C. Rep., Cr. Ca. 59.

the Regulation, and no other mode, as we have seen, can be pursued.

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The proceedings held by Mr. Anderson, the Magistrate F. P., must, therefore, be annulled, and his commitment cancelled, as having been made without authority. On information duly laid before the Magistrate of the District, it will be his duty to dispose of the case in accordance with the law.

GIBBS, J.:—I concur with Mr. Justice West in the conclusion at which he has arrived. The

Session Judge of Khándesh No. 702, of 7th August 1867. Court's reply, No. 1213, dated 19th August 1867.

question has never before been raised in court. A reference was made by the Session Judge of Khándesh as per margin, in which it might be

said to have been partially raised, and the court's reply certainly gives rise to the view taken by the Session Court that it had jurisdiction to try such cases.

I remember the reference being discussed in chambers, and I think Mr. Justice Newton then pointed out that as the functions of the Criminal Judge had been transferred to the Session Judge, the latter officer could dispose of such cases as the present.

I think, however, that had the matter been discussed fully, as it now has been by Mr. Justice West, we should not have agreed on the reply then sent to Mr. Hobart.

It appears to me that Reg. XXI. of 1827 gives permission that the complaint may be made before the Criminal Judge or Zillá Magistrate; if, therefore, the former officer were to be considered as represented by the "Session Judge," it follows that the complaint should be made before him. As a Session Judge cannot now, by the Code of Criminal Procedure, Sec. 359, act on a complaint made before him (save in special cases mentioned in that section, and of which opium-smuggling is not one), it also follows that he cannot try such cases any longer.

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1871.  
Sept. 8.

CHAKU ..... *Petitioner.*  
ISHVAR BHUDAR ..... *Opponent.*

*Maintenance Order—Adultery of Wife proved after Order for Maintenance made—Cancelling Order—Crim. Proc. Code, Sec. 316.*

It is open to a husband upon whom an order to make an allowance for the maintenance of his wife has been made, under Sec. 316 of the Criminal Procedure Code, after such order has been made, to prove that his wife is living in adultery, and upon such proof a Magistrate is justified in cancelling an order made under the above section.

A. A. BORRADAILE, Magistrate of the District of Ahmedábád, submitted the papers and proceedings in the above case, under Sec. 434 of the Criminal Procedure Code, for the orders of the High Court.

The petitioner, Chaku, obtained from Jagjivandás Khusháldás, Magistrate F. P., under date the 22nd of June 1865, an order of maintenance from her husband, Ishvar Bhudar. The order was made by the Magistrate under Sec. 316 of the Criminal Procedure Code. On the 1st of July 1871, however, Jágjivandás's successor (J. F. Fernandez, Magistrate F. P.) cancelled the order in question on the application of Ishvar Bhudar, who proved that Chaku was living in adultery. Chaku thereon applied to the Magistrate of Ahmedábád for a review of the order of the 1st of July 1871, by which her maintenance was disallowed. The District Magistrate considered the cancelling order to be illegal, for the following reasons :—

“I am certainly of opinion that Sec. 316 refers to original applications only, and that Sec. 317 provides the procedure for alteration of an order.

“I am not inclined to hold that reduction does not include cancellation ; there is no limit to the reduction possible.

“I hold that Sec. 317 refers to cases based on “alteration in the circumstances” of the person on whom the order was passed, his wife or child, and in the present case there is no such alteration. The fact of the wife leading an immoral life cannot create such alteration, because the husband has

all along complained of her leading such a life : it is no new fact which has arisen since the original order.

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v.

I. HVAR

BHUDAR.

“It may, it is true, be urged that the original order was passed in the absence of proof of adultery, and that the adultery being new ground, the alteration in the circumstances of the wife is created. I am not prepared to say that such argument is unreasonable, but I cannot sufficiently agree with it to reject the application thereon ; the less so, that this would necessitate my weighing the evidence as to the immoral life.

\* \* \* \* \*

“I find that an illegality has apparently been committed by the Magistrate F. P. in altering the order of his predecessor, and I determine, under Sec. 434, to forward the case for the orders of the High Court.”

The reference was considered by GIBBS and WEST, JJ., on the 8th of September 1871.

*Nagindás Tulsidás* for the petitioner, Chaku.

*Nánábhái Haridás* for the husband, Ishvar Bhudar.

The following answer was forwarded to the District Magistrate of Ahmedábád, in reply to his reference :—

“I have the honour, by direction of the Honorable the Judges, to state that their Lordships are of opinion that it is open to the husband to prove adultery on the part of the wife at any period, and that the last para. of Sec. 316, which provides that no wife shall be entitled to receive an allowance from her husband if she is living in adultery, sufficiently shows the object of the Legislature. If you, therefore, upon a review of the facts, are of opinion that Chaku *alias* Jari is living an adulterous life, you would be legally justified in upholding the decision of the Magistrate F. P.”

1871.  
March 22, 23,  
24, April 12.

REG. V. KA'SHINA'TH DINKAR, GOVIND NA'RA'YAN,  
and SA'I NARSA'PPA'.

*Confession—Warning by Magistrate to Accused—Allegation of Maltreatment prior to Warning inducing Confession—Appeal to Sessions Court—Inquiry by Sessions Court—Prisoners affirmed—Admissibility of Evidence—Perjury—Sanction for Prosecution pending Inquiry—Causing Evidence of Crime to disappear—Crime committed by Accused—Ind. Pen. Code, Sec. 201—Abetment—Advocate's Privilege of Speech—Untrue Statements in Petitions—Contradiction upon Affidavit—Public Prosecutor, Duty of—Improper Appointment—Magistrates to be examined on Oath.*

Although the averment on the record of a Magistrate by whom a prisoner is tried, that the accused, before making a confession, was warned that it was optional with him to answer the questions put to him or not, is on appeal conclusive as to the fact of such a warning having been given, it is not conclusive to show that such a confession has not been made under the influence of fear engendered by *previous* maltreatment, or is not otherwise valueless.

Allegations, made in a regular and proper manner before a Sessions Court on appeal, that a confession made by the accused before the Magistrate who tried the case was made under such circumstances as to preclude its admissibility in, or diminish its value as evidence, should receive due attention and be inquired into. A Sessions Court refusing to make such inquiry commits a grave error in law and procedure.

Upon an inquiry which the High Court directed the Session Judge to make into such an allegation, the prisoners were ordered to be, and were, solemnly affirmed, and the prosecution neither objected to the form of the order nor to the affirmation of the prisoners, and moreover cross-examined them, but objected to their evidence being used upon the return of the inquiry. It was held that the objection, though possibly good if taken in time, was too late, and that the evidence of the prisoners might be used, whether the order directing them to be affirmed was correct or otherwise.

Where *during* such an inquiry the Sessions Judge accorded his sanction to the prosecution for perjury of some of the witnesses who deposed on behalf of the prisoners, the High Court considered such a proceeding improper, and eminently calculated to defeat the object of the inquiry.

*Semble.* A person cannot be convicted, under Sec. 201 of the Penal Code, of causing evidence of the commission of an offence by himself to disappear, nor can he be convicted of the abetment of such an act (per *Lloyd and Kemball, JJ.*).

Question as to the extent of the privilege of speech accorded to counsel and advocates considered.

Important statements made in verified petitions to the High Court, if untrue, should be contradicted on affidavit.

Appointment of the Magistrate, who in the first instance had tried and convicted the accused, to be Crown Prosecutor to conduct an inquiry subsequently directed in the same case, censured as being unprecedented and objectionable. A Public Prosecutor should be without a personal interest in the cases which he conducts.

Prisoners should be allowed to have free converse with their *vakils* out of the hearing of the police officers in charge of such prisoners.

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DINKAR  
*et al.*

It is undesirable that Magistrates whose decisions are under appeal, or who have been engaged in promoting the prosecution, or police officers concerned in a case, should sit on the bench beside, or converse privately in court with, the Judge who is engaged in trying the prisoners' appeal. If the appellate Judge wishes to ascertain any facts relating to the case from the Magistrate who convicted the accused, he should examine the Magistrate upon oath or solemn affirmation, in the same manner as an ordinary witness.

THE accused were convicted by C. B. Pritchard, Magistrate F. P. in Khándesh and Násik, on a charge "that they, knowing, or having reason to believe, that an offence had been committed, abetted the causing of evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, contrary to Secs. 109 and 201 of the Indian Penal Code," and were sentenced each to suffer rigorous imprisonment for eighteen months and to pay a fine of Rs. 1,000, or in default to be rigorously imprisoned for a further period of three months.

The accused appealed to the Session Judge of Khándesh, who confirmed the conviction and sentence.

An application was then made to the High Court for the exercise of its extraordinary jurisdiction. Upon this application the record and proceedings in the case were sent for, and upon their receipt the matters of the application were argued before LLOYD and KEMBALL, JJ.

Anstey (with him *Shántáráṃ Náráyaṇ* and *Ghanashám Nílkant*) appeared for the applicants, and contended that the convictions could not be upheld, principally upon the following grounds:—(I.) Because it appeared, from the record sent up by the Magistrate, that the offence (if any) of which the prisoners were accused of having abetted the causing of the evidence to disappear, was an offence committed by themselves—a case not within the purview of Sec. 201 of the Penal Code; (II.) because the abetment of the offence (if any) had taken place in the Násik collectorate, where the Magistrate who tried the case had no jurisdiction; (III.) because the conviction was based upon the confessions of the accused, which

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had been extorted from them by torture, and that the Sessions Judge had refused to inquire into the allegations of such torture, though he had been in due course called upon to institute such inquiry.

*Ganpatráv Bháskar*, on behalf of *Dhirajlál Mathurádás* (Government Pleader), appeared for the prosecution.

*Cur. adv. vult.*

On the 16th of December 1870 the judgment of the Court was delivered by LLOYD, J. :—In this case Káshináth Dinkar, Govind Náráyan, and Sáí Narsáppá have been convicted by Mr. Pritchard, who styles himself Magistrate F. P. in the Khándesh and Násik Districts, and each has been sentenced to eighteen months' rigorous imprisonment, and a fine of Rs. 1,000, or in default three months' rigorous imprisonment, under Secs. 201 and 109 of the Indian Penal Code.

The Session Judge of Khándesh having thrown out their appeal, the prisoners have applied to this court for the exercise of its extraordinary jurisdiction; and amongst the grounds urged in their petition, the one which has taken precedence in the argument of the learned counsel for the prisoners is that the applicants cannot be convicted under Secs. 201 and 109 of the Indian Penal Code.

This trial has arisen out of frauds which are alleged to have been committed during the progress of certain works which were carried on, under the supervision of the Public Works Department, for the relief of the population suffering from the famine which prevailed in the district of Khándesh in the year 1869.

In the 3rd para., and again at the conclusion of his finding, the Magistrate observes that "the evidence, the disappearance of which the accused have been convicted of abetting, would, the Court fully believes, have shown that they had embezzled very large sums of Government money, and that the disappearance has proved their screen from due punishment."

It must be taken, therefore, as found, that the offence of which the evidence has been caused to disappear was com-

mitted by the accused themselves, but it is argued that the law quoted applies to the causing the disappearance of evidence of an offence committed by another, and not by the person who is charged with causing the disappearance; and in support of this proposition the cases noted at page 149 of Mayne's Commentaries, 6th ed., have been referred to (a).

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In neither of these cases does it appear that the point was argued; and it is to be regretted that in the present instance the case for the prosecution, which is one of considerable importance, was not entrusted to the Advocate General or some other law officer of the Crown.

Sec. 201 and the two following sections commence with precisely the same words, thus: "Whoever knowing or having reason to believe that an offence has been committed:" now, as there is no law which obliges a criminal to give information which would convict himself, it is evident that Secs. 202 and 203 could not apply to the person who committed that offence, *i.e.*, "the offence which he knew had been committed;" and Sec. 201 should, we think, be construed in a similar manner: and, looking at the only illustration which follows Sec. 201, it would appear that the law was intended to apply exclusively to "another," and we are, therefore, of opinion that the conviction of the accused, as accessories to an offence known or believed to have been committed by themselves, is illegal.

That being so, it remains for us to look into the evidence to ascertain whether there is proof on the record of the convicts' guilt in respect of any other offence connected with the matter under investigation, with which they ought to, or might, have been charged. As regards Káshináth, after reading over the papers in the case, we see no alternative but to order his release, as we deem the evidence of Sitáráam and other witnesses quite insufficient to sustain the convic-

(a) The High Court of Bengal has ruled that this "section applies to the causing the disappearance of evidence of an offence committed by another, not by one's self (1 R. C. C. Cir. 19). The person who commits an offence, and afterwards conceals the evidence of it, cannot be punished on both heads of charge (3 R. C. C. Cr. 3)."



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tion of this convict of any particular act of fraud. With regard to the other two convicts, the case, however, is quite different, for we have on record express admissions, contained in their examinations before the Magistrate, of various particular frauds perpetrated by them; but a great deal has been said in the course of the argument with respect to undue influence having been exercised to induce Govind Nárāyaṇ and Sái Narsáppá to confess their guilt, and indeed the learned counsel for the prisoners has not hesitated positively to assert that cruel and revolting practices were resorted to, in the presence and with the approval of the trying Magistrate, to extort these confessions, and that subsequently the prisoners were debarred from free intercourse with their *vakíl*. The details of this abuse of authority are alleged to have been set forth in a written paper presented at the hearing of the appeal, but which the Session Judge declined to receive.

In his minute Mr. Hobart says he would not receive a written statement offered by the *vakíl*, because he refused to state the contents of it, and "it was contrary to the practice of his court to receive anything of this sort from a *vakíl*." It is alleged that the Session Judge was aware of the contents of the document, but, whether he was so or not, considering the circumstances of the case, Mr. Pritchard being in the position of prosecutor as well as trying Magistrate, we do not think he exercised a sound discretion in declining to receive it.

However, looking to the complexion the case now bears, it becomes absolutely necessary, to enable us to dispose finally of the appeal, that the circumstances under which the admissions were made should be investigated and reported to us. The Session Judge is, therefore, directed to send for the said two convicts, and, after calling upon them to give on solemn affirmation a detailed statement of the undue influence practised upon them, to inquire fully into their complaint, giving the Government Prosecutor due notice of the investigation, and, after recording the evidence, to forward it, together with his opinion thereon, to this court. Then

followed some dicta as to the jurisdiction of Mr. Pritchard as a Magistrate in the Násik collectorate, which it is not material to set forth here, as the question was afterwards and finally decided by the Full Court.

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In pursuance of the directions contained in the above judgment, the Honorable George Hobart held an inquiry into the allegations of torture made by the prisoners. Mr. Pritchard, the Magistrate who had originally tried the case, but who at the time of the inquiry was employed by Government in tracing out certain frauds that were alleged to have been committed in the Public Works Department, was, under the circumstances mentioned in the judgment of the Full Court, appointed by Mr. Ashburner (District Magistrate of Khándesh) to act as Public Prosecutor on the taking of the inquiry.

The prisoners were examined on solemn affirmation, and deposed to several alleged acts of torture committed upon them by the police. Several witnesses were also called to corroborate their statements. After the case for the accused was closed, but before the witnesses on behalf of the Crown were examined, the Sessions Judge, on the application of Mr. Pritchard, gave his sanction to the prosecution for perjury of some of the witnesses, who had been examined for the accused, and one of these witnesses, during the pendency of the inquiry, was tried but acquitted.

On the close of the inquiry the Sessions Judge reported his opinion upon it. The material portion of his report was as follows :—

“In certifying to the High Court the evidence taken and recorded, I shall express my opinion to this effect, namely, that beyond the fact of Govind Náráyan and Sái Narsáppá being, at other times than when brought before the Magistrate during their trial, occasionally kept handcuffed, it has not been proved that either Govind Náráyan or Sái Narsáppá was in any way harshly treated, still less subjected to torture. I am of opinion that the evidence shows that the Magistrate was aware that Govind Náráyan and Sái Narsáppá were so

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kept handcuffed, and that he does not appear to have interfered to prevent it; and I think it is to be regretted that this restraint was imposed on Govind Nárāyaṇ and Sái Narsáppá, because there is nothing to show that either of them was so conducting himself as to make such restraint necessary."

Upon this return being made, the case came for final determination before a Full Bench composed of WESTROPP, C.J., LLOYD, MELVILL, GREEN, and KEMBALL, JJ.

*Anstey* (with him *Shántárām Nárāyaṇ* and *Ghanashám Nilkant*) for the prisoners.

*McCulloch* (with him *Dhirajlál Mathurádás*, Government Pleader) for the Crown.

The case was heard on the 22nd, 23rd, and 24th days of March 1871.

*Cur. adv. vult.*

April 12th. WESTROPP, C.J.:—Upon the 13th of May 1870, Káshináth Dinkar, Govind Nárāyaṇ, and Sái Narsáppá were, by Mr. C. B. Pritchard, Magistrate F. P., found guilty upon a charge that they, knowing, or having reason to believe, that an offence had been committed, abetted the causing of evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, contrary to Secs. 109 and 201 of the Penal Code, and were sentenced each to suffer rigorous imprisonment for eighteen months, and each to pay a fine of Rs. 1,000, or in default be rigorously imprisoned for a further period of three months.

Upon the 11th of June they, by petition, appealed to the Session Judge of Khándesh, the Honorable Mr. Hobart. That petition, amongst other objections to the validity of the conviction, alleged as follows:—

"We had engaged two *vakíls* in the Khándesh Adálat and brought them to Sultánpur to defend us before the Full Power Magistrate, but we were not allowed to communicate with them according to law. We were not able to give full information to our *vakíls* relating to the case, as it was

ordered by the Magistrate that we should communicate with them in Maráthi in the presence of police inspectors. We were, therefore, not able to derive legal assistance from our *vakils*, and were compelled to tell them to return without defending us." The 8th paragraph, which it will be perceived related to the prisoners Govind Náráyaṇ and Sái Narsáppá, was as follows:—"8. Moreover, we, Govind Náráyaṇ and Sái Narsáppá, further beg to observe that we were examined, and in our depositions have partially confessed to the truth of the charges preferred against us, but those our depositions are contrary to Sec. 203 of the Criminal Procedure Code, in the following manner:—

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"1st—We both of us were arrested at Málligám on the 28th of March, at 9 P.M. From that time up to the date of our examination we were in the custody of the police inspectors Hafizullá Manzullá and Náráyaṇ Kṛishṇa for more than a month and a half. 2nd—From the time of our arrest at Málligám we were made to travel about four hundred miles, being obliged to follow the court of the Magistrate, on tour, and go to other places. 3rd—The causes of our confession are our being obliged to travel through fearful jungles, and our being subjected to hardships by the two said inspectors." (The Maráthi word rendered "hardships" in the original translation has been rendered by the Interpreter of this court "pain-producing or pain-causing circumstances.")

"As we were much weakened by our having been in the custody of the police for days and nights together, and by our having been compelled to travel from jungle to jungle and place to place, we, to extricate ourselves from this distressed condition, through sheer helplessness, deposed according to the instructions of the police, but contrary to our will, and contrary to the real circumstances of the case, before the Magistrate."

This petition concluded by stating that there were other grounds for appeal, which the petitioners, on obtaining copies of the papers in the case, would state in the course of the hearing of the appeal. That petition was signed by their *vakíl*, Kṛishṇáji Hari.

The Session Judge, on the filing of that petition, directed the Magistrate to forward the record of the proceedings

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before him to the Session Court, and also appears to have admitted the prisoners to bail.

During the hearing of the appeal before the Session Judge, the three appellants, through one of their *vakíls*, presented to the Session Judge a further petition, dated 18th July 1870, by way of supplement to their original petition of appeal to him of the 11th of June.

That supplemental petition, which has been at times during the argument somewhat inaccurately called a *darkhást*, is as follows:—

“To the Sessions Judge.

“SIR,—Your humble petitioners, Káshináth Dinkar, Govind Náráyaṇ, and Sáí Narsáppá, beg to observe—

“1. That, according to the Penal Code, Sec. 201, it is necessary for the commission of the offence that the evidence against a third person should be made to disappear, which has not been done in this case.

“2. The Magistrate had no authority (jurisdiction) to investigate this case.

“3. According to Act II. of 1855, books, before they could be admitted as evidence, must be proved in a particular manner. As the books referring to this case were not proved in that manner, they could not be put in as evidence.

“4. There was a mistake in law in admitting Khándu Sing as a witness.

“5. It was a mistake to receive additional evidence in some places in this case.

“6. The following issues should be inquired into and determined after taking evidence—

“(a). *Whether the confessions of Govind Náráyaṇ and Sáí Narsáppá were made (or occurred) against their will.*

“(b). *Whether the police people accompanied all or some of the witnesses in this case on their way to the court. And whether, after their having come to give evidence, they were under the restraint of the police.*

“(c). *Whether there was any hindrance to private conversation taking place between the appellants and their vakíls.*

“We humbly request that the evidence we may produce regarding these points may be admitted, and the case be decided accordingly.

“18th July 1870.”

That petition was signed by two *vakíls* for the appellants, namely, Krishnáji Hari and Vináyakráv Trimbak Gole.

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Upon the same day (July 18th) the Session Judge refused to receive that supplemental petition as part of the proceedings in the appeal, but did not return it to the appellants or their *vakíls*. He indorsed upon it his reasons for declining to admit it upon record, as follows :—

“This petition cannot be admitted, because, when the *vakíl* is present, whatever information is required must be communicated verbally according to usage, and (as this is not done in this case) the petition cannot be received.

“G. A. HOBART,  
“Sessions Judge.

“18th July 1870.”

It would appear, however, from the Session Judge's judgment that every objection raised in that petition was in fact verbally urged before him on the hearing of the appeal, and he endeavoured in his judgment to answer each of those objections. Amongst the remarks of the appellants' *vakíl* which the Session Judge notices is this :—

“That this court (the Session Court) should make inquiries as to the manner in which Sái Narsáppá and Govind Náráyan's admissions were taken.” Immediately afterwards the Judge in his record makes this remark as to the supplemental petition :—

“The *vakíl* offers a written paper, which he requests the Court to have read. He is desired to state the contents, which he refuses to do. He gives no reason for his refusal, and, it being contrary to the practice of this court to receive *anything of this sort* from a *vakíl*, after receiving the written petition of appeal forming the ground on which the record of the trial is sent for, I reject this document.”

It is very difficult to understand why the appellants' *vakíl* should have refused to state the contents of the supplemental petition, as the Judge has recorded him as having done. There does not appear to have been any passage in it which he need to have been afraid to read. The appellants,

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not having copies of the papers, when presenting their original petition, reserved to themselves by it the right to bring forward additional points of appeal afterwards. It was perfectly regular under such circumstances to do so by supplemental petition, and the Judge ought not to have rejected it. As regards the confessions, this petition merely suggests an issue as to whether they were made against the will of the appellants. We are almost led to the conclusion that the learned Judge and the *vakíl* must have misunderstood each other. For every objection and argument contained in the supplemental petition must have been put forward orally by the *vakíl*; the Judge has noticed each of them, and, amongst the rest, notices the impeachment of the value of the confession thus:—

“The objection that Sái Narsáppá's and Govind Náráyan's admissionary statements at the trial are of no weight against them, as having been obtained by undue influence, is an objection which I must take to be based on untruth, for at the head of the examination of each of these accused the Magistrate has recorded a warning given them by him, that they need not answer any question he might put to them unless they chose. It seems to me clear that if they mean to insinuate that undue influence was employed by the Magistrate, it is an objection this court cannot entertain. It would be an imputation on the Magistrate of bad faith, into the truth of which it would be beyond the power of this court in this proceeding to inquire. There would be no finality in proceedings of this sort if the appellate court were to enter into such questions.”

No doubt the learned Judge would be quite right in holding that the record of the Magistrate was, on the appeal to the Session Court, conclusive as to the fact that the Magistrate had warned the appellants that it was optional with them to answer the questions put to them or not. And it may be that the truth of the averment to that effect in the Magistrate's record could only be questioned in a proceeding against the Magistrate himself, by way of criminal information or some equivalent procedure in respect of malversation



in his office, because such a statement on record must, on appeal, be taken to import absolute verity. But it is quite a mistake to suppose that such an averment on record would preclude an inquiry on appeal to a Session Court into other circumstances under which the confession might have been taken. It is quite possible, notwithstanding that such a warning may have been given by a Magistrate, that the confessions, as evidence against the party confessing, may have been wholly valueless. For instance, a party may have been, at the time of confessing, intoxicated or insane, or under some temporary delusion, or the influence of fear engendered by previous maltreatment of the police or other persons, or induced to make admission by some reward or improper inducement previously held out to him. Allegations, made in a regular and proper manner to the Session Court, that a confession before a Magistrate was given under any such circumstances, should receive due attention and be inquired into, and if the Session Court were to refuse to make such inquiry it would certainly commit a very grave error in law and procedure. It is no legal answer to a demand for an inquiry upon such allegations that the Magistrate had warned the accused that it was optional with him to answer the questions put to him or not, although the fact that such a warning had been given would be a legitimate matter for comment by the prosecutor.

The Session Judge in this case, when he made the remark already extracted, "if they mean to insinuate that undue influence was employed by the Magistrate," &c., seems to have wholly lost sight of the original petition of appeal presented to the Session Court, which stated, not that they had been in any wise unduly influenced by the Magistrate, but that, after long travelling and fatigue, and being subjected to "pain-producing circumstances" by the inspectors of police, as recounted in that petition, they, the appellants, in order to extricate themselves from that distressing condition, "deposed according to the instructions of the police, but contrary to our (their) will, and contrary to the real circumstances of the case, before the Magistrate." The fact that the

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Magistrate warned them that it was optional with them or not to answer his questions, is not any answer to the allegation that they deposed in conformity with the instructions of the police, in order to escape from the hardships to which they had been subjected. The Judge should have made some inquiry into that allegation. Probably a succinct inquiry, judiciously conducted, would at that time have been quite sufficient to have ascertained how far the allegation was founded on fact. We are not unmindful that it is a painfully common practice in this country for prisoners, who have made full confessions before a Magistrate, as fully to retract them before the Session Judge, and to allege that their confessions have been made when those accused persons were in a state of terror and duress, and after they had been maltreated and tampered with by the police. Statements to that effect are often untruly made or grossly exaggerated, and their very frequency tends to harden the mind against their reception, so that such a retraction is, it must be admitted, most usually regarded with suspicion. Even although this is so, the constant iteration of such charges against the Native police is also suggestive of the probability that their recurrence would not be so continual were they at all times without foundation. It would be a most perilous doctrine for the subject, were this court to sanction the supposition that the retraction of confessions, and assertion of ill-usage as their producing cause, are so invariably untrue as to warrant Courts of Justice in rigidly closing their ears and refusing to entertain or investigate that assertion. Our experience, we regret to say, is not identical with that of Mr. Ashburner, who, on the inquiry (of which more hereafter) directed by the Second Division Court stated, in his evidence that within his experience a case of extorted confession has never been satisfactorily proved. Generally speaking, such a case is difficult of proof. But the records of the Sadr Adalat and of this Court bear melancholy testimony to the fact that such cases have been at times thoroughly established in proof, and also show that the perpetrators of torture and other malpractices have been duly punished.

The Session Judge, upon the 23rd of July, gave judgment against the three appellants upon all the points raised by them, and rejected their appeal.

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Upon the 29th of September the same three persons caused a petition to be presented to the High Court.

That petition, after stating the conviction and sentence by Mr. Pritchard, and the affirmance of them by the Session Judge, proceeded to mention the points on which the petitioners sought a reversal of the convictions and sentences. Amongst those points was one that Mr. Pritchard had not jurisdiction as a Magistrate F. P. in Násik, and a general objection that he had not jurisdiction to try the case. They also objected that the Session Judge "received and used verbal, albeit unsworn, information from the Magistrate F. P. on some material points, such as whether the accused were not allowed properly to instruct their *vakíls*. It is also objected that the Session Judge "*refused to receive evidence on the point whether the confessions of Sáí Narsáppá and Govind Náráyan were extorted or not*, and also whether the witnesses in the case were accompanied by police peons to the court or not;" and the petition next alleged that "*the confessions of Sáí Narsáppá and Govind Náráyan were obtained by torture and deception.*" Its final allegation was that the petitioners could not be properly convicted under Secs. 201 and 109 of the Penal Code.

The three petitioners duly signed that petition, and respectively made solemn affirmation, in the presence of Mr. Edwards, a Magistrate F. P., to the truth of its contents.

That petition first came before my brothers Gibbs and Melvill. They, considering the question as to the jurisdiction of Mr. Pritchard such a point of law as *primá facie* warranted the petitioners in applying to the High Court as a Court of Revision, on the 29th of September ordered that the record and proceedings in the case should be sent for.

They expressed no opinion upon the other points. If one plausibly good point of law is shown to the court before which a petition of revision first comes, the practice, in order

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to save time, has been to send for the record and proceedings, and to leave it to the petitioners to argue that, and such other points of law and procedure in the Division Court before which the record and proceedings eventually come, as may be raised by their petition.

The papers having been transmitted from Khándesh, the case was argued in the Second Division Court, on the 30th of November and 7th of December, before my brothers Lloyd and Kemball; Mr. Anstey and Mr. Shántáram Náráyan appearing for the petitioners, and Mr. Ganpatráv Bháskar, on behalf of the Government Pleader (Mr. Dhirajlál Mathurádás), for the Crown. The only instructions which Mr. Ganpatráv Bháskar had were instructions prepared by Mr. Pritchard for the Government Pleader. Mr. Dhirajlál Mathurádás has given a sufficient reason for his non-attendance in that court upon those days, namely, that he was engaged in two other important cases for Government in the First Division Court. During the interval from the 29th of September until the 30th of November, there was not any affidavit filed in contradiction of the statement in the petition to the High Court, that "the confessions of Sái Narsáppá and Govind Náráyan were obtained by torture and deception." There has been, we fear, too much laxity of practice at this side of the court on the part of Pleaders, in permitting important statements of fact in verified petitions to remain uncontradicted by oath or solemn affirmation, to admit of our saying more than that it would have been desirable that such an affidavit had been filed in this case previously to its coming before the Second Division Court. The allegation that the confessions were procured by torture and deception, being coupled with the objection that the Session Judge (who was bound to investigate the case, as well on the facts as the law, and was at liberty to take any fresh evidence which might be necessary) refused to receive evidence on the point whether the confessions of Sái Narsáppá and Govind Náráyan were extorted or not, a Court of Revision could not avoid noticing the allegation that torture and deception had been used. Moreover, on the record of the case then before

it, there was the patent fact that the Session Judge had, on the appeal to him, declined—for a reason, as we have already stated, wholly insufficient in point of law—to investigate the circumstances under which the confessions were taken.

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The Registrar's note, in pencilling, on the papers, stating the point of jurisdiction on which my brothers Gibbs and Melvill admitted the petition to the High Court, having been brought to the notice of my brothers Lloyd and Kemball, they ascertained from the former Judges that they had not made any order limiting the argument to the question of the jurisdiction of the Magistrate.

Accordingly, other points raised in the petition, as well as that point, were discussed before the Second Division Court, and, amongst them, whether the conviction was sustainable under Secs. 201 and 109 of the Penal Code, which the Second Division Court decided in the negative: being of opinion that—construing Sec. 201 with the aid of Secs. 202 and 203, which are *in pari materiâ* with it, and could not be supposed to impose upon a man a punishment for not giving information of an offence committed by himself—Sec. 201 could not have been intended to render a man punishable for causing evidence of the commission of an offence by himself to disappear; and if such making away with evidence of his own offence were not itself an offence, the abetment by him of making away with such evidence could not, under Sec. 109, be an offence. To the petitioner Káshináth Dinkar the Second Division Court gave the benefit of that opinion, and quashed his conviction and sentence. He had not made any confession of guilt; and that court considered that the evidence before the Magistrate, so far as it affected Káshináth Dinkar, did not show any other offence by him, upon which, under Sec. 426 of the Criminal Procedure Code, the sentence could be supported.

Returning to the argument before the Second Division Court on other points, we find that not only were the allegation of torture and deception, and that of the refusal of the Session Judge to inquire into its truth, strongly relied upon, but by oral statements, which the petitioner's counsel

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must have been instructed to make, and did make, it was imputed to the Magistrate that torture was inflicted upon the petitioners in his presence and with his sanction. That imputation was unsupported by affidavit either upon oath or solemn affirmation, and was alike unsupported by any statement in the record of the proceedings before the Magistrate himself, or before the Session Judge on appeal. It was, indeed, at first stated to the Second Division Court by the learned counsel, that the details of these tortures were set forth in the supplemental petition presented to, but rejected by, the Session Judge. But the learned counsel was under a misapprehension in that respect, and having, as we learn from himself, been informed by Mr. Shántáram Náráyaṇ, who came into court about that time, that the details were not set forth in that petition, the learned counsel withdrew or materially modified his statement that tortures were so set forth in detail—but (and we do not suppose that this was intentional) not with sufficient emphasis, or in a sufficiently marked manner to arrest the attention of the Second Division Court, which, accordingly, continued under the impression that the original statement remained unaltered. Even the learned counsel's own recollection that he had made the correction must have been far from vivid: for recently, when opening this case before us, he did so on the hypothesis that the supplemental petition did contain the details of the torture, until that petition was read to him by the court, and the circumstance of his having made the correction on the previous occasion at the suggestion of Mr. Shántáram Náráyaṇ was, apparently after a conversation with that learned gentleman, recalled to the memory of the learned counsel. The interval of three or four months may be sufficient to account for this.

No doubt, in obeying his instructions, by asserting that torture had been inflicted upon the petitioners in the presence and with the sanction of the Magistrate, the learned counsel could not have been influenced by any other or less worthy motive than the desire to perform his duty towards his clients. How great is the privilege of speech accorded by law to

counsel for the sake of his client, and for the sake of the public, is testified by authorities ancient and modern. In *Wood v. Gunston* (A.D. 1655) (a) it was said by Glyn, C. J., "that if a counsellor speak scandalous words against one in defending his client's cause, an action doth not lie against him for so doing, for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions." In *Brooke v. Montague* (b) the court said that counsel "hath a privilege to enforce anything which is informed unto him for his client, and to give it in evidence, it being pertinent to the matter in question ; and not to examine whether it be true or false, but it is at the peril of him who informs it ; for a counsellor is, at his peril, to give in evidence that which his client informs him, being pertinent to the matter in question, otherwise action on the case lies against him, as Popham said ; but matter not pertinent to the issue, or the matter in question, he need not deliver, *for he is to discern, in his discretion, what he is to deliver, and what not*, and, although it be false, he is excusable, being pertinent to the matter ; but if he give in evidence anything not material to the issue which is scandalous, he ought to aver it to be true, otherwise he is punishable, for it shall be intended as spoken maliciously and without cause, which is a ground for an action." We are not to be understood as for a moment adopting Chief Justice Popham's dictum as to an action on the case lying against counsel if he do not put forward all of what his client may have informed him, and which is pertinent to the issue, any more than we adopt another dictum of the same learned Judge (irrelevant to the present question) at the close of the same case, to the effect that *Greenwood v. Prist*, there cited, is good law, it having been overruled in *Hearne v. Stowell* (c). The instructions of the client, if acted on by counsel, would often be more productive of injury than of benefit to the client. It must frequently have been within the experience of counsel in large practice, especially in this country, to have been instructed to make allegations, in themselves so vehemently improbable and inconsistent with the main facts, as, if made, would throw a cloud upon,

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(a) Styles' Rep. 462. (b) Cro. Jac. 90. (c) 12 Ad. & E. 26.

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and irretrievably damage, an otherwise fair case. It would be absurd to maintain that counsel, who declined to carry out such suicidal instructions, laid himself open to an action for having thus exercised the discretion which unquestionably is intrusted to him. The rule as to the position of counsel is fully and satisfactorily laid down in two modern cases. The first is that of *Hodson v. Scarlet* (d), an action by an attorney against the defendant (afterwards Lord Abinger, C. B.) for slanderous words spoken by the latter as counsel in a cause. The court seemed to think that the remark containing them was too severe, being, as Lord Ellenborough, C. J., happily phrased it, an "expression" which, "in the exercise of a candour fit to have been adopted, might have been spared," but the court being also of opinion that it could not be said that there was no reasonable and probable cause for the words, and that they were relevant and pertinent to the cause in which they were spoken, held that the action could not be sustained. Bayley, J., observed that "these are not facts of a calumnious nature stated by the defendant, but are epithets attaching on the conduct of the plaintiff *from facts proved in the cause*. Holroyd, J., said: "The words were spoken in a case after the evidence was given, upon which they were a comment. The jury had heard the facts, and were capable of judging of the accuracy of the comment, which was made for the purpose of showing to them the view which the defendant took of all the circumstances which had appeared in that case. It is stated by Lord C. B. Comyn that "words which denote opinion or suspicion are not actionable." Here the words denote only the opinion of the speaker, and were addressed to the jury intending to convey to their minds the same opinion. I apprehend that a counsel is in the same situation and under the same protection as the party himself, with this exception, perhaps, that a party, from his comparative ignorance of what is, or is not, relevant, may be indulged in a greater latitude, and not be restricted within the same limits as a counsel, whose superior knowledge of itself should be sufficient to restrain him within due



bounds." After referring to the authorities, he proceeded thus:—"These cases show the privilege possessed by parties themselves, and from these authorities it appears that no action is maintainable against the party, nor, consequently, against the counsel, who is in a similar situation, for words spoken in a court of justice. If they be fair comments upon the evidence, and be relevant to the matter in issue, then, unless express malice be shown, the occasion justifies them. If, however, it be proved that they were not spoken *bonâ fide*, or express malice be shown, then they may be actionable—at least our judgment in the present case does not decide that they would not be so." In all of the preceding cases the defendants were counsel, and the actions were for slander alleged to have been uttered by them. The last case, *Butt v. Jackson* (e), which we shall mention (and at which it was my good fortune to have been present as one of the audience), was an application on behalf of one of Her Majesty's counsel for leave to file a criminal information against an attorney, upon whose conduct the former, in his capacity as counsel, had animadverted strongly in another case, imputing to him the concoction of evidence to sustain an indictment, in return for which the attorney challenged the learned counsel to fight a duel. The argument (most unhappily not preserved in the report of the case) of Mr. Henn, Q. C., for the defendant, on the subject of the true limits of the privilege of counsel, has never been surpassed in excellence. It attracted much attention and admiration at the time (1846). The unanimous judgment of the Court of Queen's Bench in Ireland was delivered by one who himself had been an eloquent and independent advocate, and who, with high ability, filled in his lifetime more, perhaps, of the highest judicial offices than any other man has held. He was Master of the Rolls, Lord Chief Justice, Lord Chancellor, Lord Justice of Appeal, and again Lord Chancellor. The following passage extracted from the judgment of Lord Chief Justice Blackburn, of whom I have been speaking, lays down the rule in a manner which leaves nothing to be

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(e) 10 Ir. Law Rep. 120, 123.



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desired :—"It belongs to every subject of this realm, in all Courts of Justice, to assert and defend his rights, and to protect his liberty and life by the free and unfettered statement of every fact, and make use of every argument and observation that can legitimately—that is, according to the rules and principles of our law—conduce to these important ends. Every man has this right, and may exercise it in his own person—he may commit its exercise to counsel, who takes it as his delegate; its nature and character is not altered by this delegation; it is still the same, to be exercised in the same manner and for the same purposes, and subject to the same limitation and control, as it would if the party were pleading his own cause. *These considerations will at once show the fallacy of the argument, that instructions to counsel are the test by which we should try whether or not the line of duty has been passed; no instructions can justify observations that are not warranted by facts proved, or which may legally be proved; and it is the duty of counsel towards their clients to use their own judgment and experience and discretion; and as the result, whatever be their instructions, to exclude all topics and observations of which the case does not properly admit. Subject to its just and necessary limits, this right, when duly exercised and directed to its proper purposes, should not be fettered or impeded; for if it be, an injury is sustained, not by the advocate, but by the client, and not by the client alone, but by the whole community, whose interests are inseparably connected with a right essential to the administration of justice.*"

Keeping in view the principles thus laid down, and bearing in mind that the first petition presented to the Session Judge went no further than to assert that the petitioners had been subjected to "pain-producing circumstances" by the police, and did not contain the slightest suggestion that this was done, or that torture was practised upon them, with the knowledge or sanction of Mr. Pritchard; recollecting also the total absence of any assertion in the argument of the petitioners' *vakils* before the Session Judge, so far as it is embodied in his judgment, that Mr. Pritchard was

any party to torture, and the equally profound silence on the same point of the petition presented to this court (then and now sitting merely as a Court of Revision), anxious as we are to uphold to its utmost legitimate extent the privilege of the advocate, we do not think that we infringe upon it by saying that the learned counsel for the petitioners (albeit influenced by no other or less worthy feeling than that of zeal for his clients) would have exercised a sound discretion if, before he suffered himself to be made the medium for bringing a most grievous charge against the character of a Magistrate, he had required of those instructing him some statement on oath or solemn affirmation in support of the allegation that the Magistrate was present at, and concurred in, the acts of torture imputed to the police—something, in fact, to afford a reasonable ground for supposing that the charge might be legally proved, for previously proved or even suggested it most certainly had not been. And at all events we think that it behoved the learned and eminent counsel to hesitate in persisting in the charge without some such support, when he was informed by the learned Pleader with him that he (the learned counsel) was in error in supposing that the supplemental petition presented to the Session Judge contained details of any such torture. The administration of justice by the courts or the magistracy should not be assailed on light grounds, and he who does so impeach it, renders no good service to the country or his client.

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Before referring to the decision of the Second Division Court, it should be observed that, at the close of the arguments on the 7th of December, the allegation of the petitioners, in their petition to the High Court, that torture and deception had been practised upon them by the police in order to procure admission of guilt, remained undenied upon oath or solemn affirmation, and that it was not, and could not be, denied that the Session Judge had refused to investigate the truth of that assertion, and had so refused for a reason wholly insufficient in law. Under these circumstances, where the charge that the confessions (and, consequently, the pleas of guilty) upon which the convictions were based had been

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procured by torture, remained, legally speaking, uncontradicted, and, beyond all doubt, uninvestigated, the very least that the Second Division Court could do, in order to remedy so grave an error in law as that committed by the Session Court, was to direct an inquiry into the truth of the charge. What the legal form of that inquiry should be, may be a question of some nicety. The following reason appearing in the judgment of the Session Judge for his having overruled the objection of the appellants, that they had not been allowed free access to their *vakíls*, namely :—“The trying Magistrate has, *since the hearing of the appeal*, verbally informed me that the assertion is entirely false to his own personal knowledge, which I take to be conclusive on the question ;” and other allusions to personal communications between the Session Judge and the Magistrate appearing in the judgment of the former, the Second Division Court directed the Registrar to inquire what the nature of these communications was, and whether they were in the presence of the Pleaders for the appellants, or were at a subsequent period, or when. In reply to the Registrar’s letter of the 8th of December, the Session Judge, by letter of the 12th of December, stated that these personal communications were partly verbal during the hearing of the appeal, the Magistrate sitting beside him, and partly by private note subsequently to the hearing.

On the 16th of December the Second Division Court gave its judgment. After referring to the conviction and sentence by the Magistrate, and the appeal to, and rejection of it by, the Session Judge, and the application for the exercise of the extraordinary jurisdiction of the High Court as a Court of Revision, and after stating that “amongst the grounds urged in their petition” to the High Court, the one which took precedence in the argument of counsel for the petitioners was, that they could not be convicted under Secs. 201 and 109 of the Penal Code, the Second Division Court, for the reasons already mentioned, quashed the conviction of, and sentence upon, Káshináth Dinkar, and expressed its regret that the case had not been intrusted to the Advocate General or some other law officer of the Crown for argument. As to Sáí Nar-

sáppá and Govind Náráyaṇ the judgment proceeded thus :—

“ With regard to the other two convicts, the case, however, is quite different; for we have on record express admissions, contained in their examinations before the Magistrate, of various particular frauds perpetrated by them. But a great deal has been said in the course of the argument with respect to undue influence having been exercised, to induce Govind Náráyaṇ and Sái Narsáppá to confess their guilt; and indeed the learned counsel for the prisoners *has not hesitated positively to assert* that cruel and revolting practices were resorted to, in the presence and with the approval of the trying Magistrate, to extort their confessions, and that subsequently the prisoners were debarred from free intercourse with their *vakíl*. *The details of this abuse of authority are alleged to have been set forth in a written paper presented at the hearing of the appeal, but which the Session Judge declined to receive.* In his minute, Mr. Hobart says he would not receive a written statement offered by the *vakíl* because he refused to state the contents of it, and ‘it was contrary to the practice of his court to receive anything of this sort from a *vakíl*.’ It is alleged that the Session Judge was aware of the contents of the document, but whether he was so or not, considering the circumstances of the case, Mr. Pritchard being in the position of prosecutor as well as trying Magistrate, we do not think he exercised a sound discretion in declining to receive it. However, looking to the complexion the case now bears, it becomes absolutely necessary, to enable us to dispose finally of the appeal, that the circumstances under which the admissions were made should be investigated and reported to us. *The Session Judge is, therefore, directed to send for the said two convicts, and, after calling upon them to give on solemn affirmation a detailed statement of the undue influence practised upon them, to inquire fully into their complaint, giving the Government Prosecutor due notice of the investigation, and, after recording the evidence, together with his opinion thereon, to forward it to this court.*”

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The court then made some *obiter dicta*, leaning to the opinion that Mr. Pritchard had not jurisdiction in the new

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collectorate of Násik, but under the special circumstances of the case the court did not think that the question as to jurisdiction in Násik interfered with the convictions of Sái Narsáppá and Govind Náráyan, and reserved its opinion on the other points until the case should be returned for final disposal after the holding of the inquiry directed.

On or about the day on which the judgment was given, Mr. Dhirajlál Mathurádás, in Chamber, preferred a request to my brothers Lloyd and Kemball, to expunge from their judgment the passage expressing their opinion that the Advocate General or other law officer of the Crown ought to have been employed in the case, but that request was refused. No other application to vary that judgment in any respect has ever been made to them.

That judgment shows, as the fact was, that the Second Division Court remained under the original impression communicated to it by the learned counsel for the petitioners, namely, that the details of the alleged abuse of authority by the Magistrate and police in the extortion of confessions were set forth in the supplemental petition presented to, and rejected by, the Session Judge, and hence the special introduction into the judgment of Mr. Pritchard's name with respect to that alleged extortion. Although that allusion to Mr. Pritchard is cautiously made, being precluded by the words "and indeed the learned counsel for the prisoners has not hesitated positively to assert," &c., and the supplemental petition is referred to as *alleged* to contain the details; and in the part of the judgment directing the inquiry Mr. Pritchard is not mentioned; still as the supplemental petition was not then before the Second Division Court, having been detained in Dhuliá by the Session Judge, and up to that time had not been placed amongst the papers in the case, and as there was not any affidavit implicating Mr. Pritchard, my brothers Lloyd and Kemball are of opinion that the special allusion to Mr. Pritchard ought not to have been then made, and in that opinion the other members of this court concur.

The inquiry was made at Dhuliá by the Session Judge, and the proceedings taken under it, together with his report, have

been returned to, and are now before, this court. The pith of his report is in the concluding part of it, and is as follows:—

“In certifying to the High Court the evidence taken and recorded, I shall express my opinion to this effect—namely, that beyond the fact of Govind Nárāyaṇ and Sái Narsáppá being, at other times than when brought before the Magistrate during their trial, occasionally kept handcuffed, it has not been proved that either Govind Nárāyaṇ or Sái Narsáppá was in any way harshly treated, still less subjected to torture. I am of opinion that the evidence shows that the Magistrate was aware that Govind Nárāyaṇ and Sái Narsáppá were so kept handcuffed, and that he does not appear to have interfered to prevent it; and I think it is to be regretted that this restraint was imposed on Govind Nárāyaṇ and Sái Narsáppá, because there is nothing to show that either of them was so conducting himself as to make such restraint necessary.”

Mr. McCulloch, who appeared before us on behalf of the Crown, sought to object to the use of any of the evidence taken in the inquiry, on the ground that the inquiry had not been directed in a proper form, namely, that the High Court could not, having regard to Secs. 204 and 373 of the Criminal Procedure Code, lawfully direct that the petitioners should be examined upon solemn affirmation; and that, having been so examined, their depositions then made were not legal evidence for any purpose whatsoever. It may be that the words “accused person” used in these sections would be applicable to convicts examined under an inquiry directed (in the case in which the conviction has been made) by a Court of Revision, and that, consequently, the objection would have been good if taken in time; but whether it would be so or not, it was not, and is not, necessary for us to give, and we do not offer, any opinion, because we are quite satisfied that the objection was made too late, and has been completely waived on behalf of the Crown. No objection was made to the form in which the Second Division Court directed the inquiry at the time—although the Crown was then represented by a Pleader, Mr. Ganpatráv Bháskar. During the inquiry Mr. Pritchard appeared on behalf of the Crown, and, so far from making any objection to Go-

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vind Náráyan and Sái Narsáppá giving their evidence on solemn affirmation, claimed and exercised the right to cross-examine them, and thereby availed himself of the order of the Second Division Court, and obtained for the Crown a privilege which it could not have had unless the petitioners had been put on solemn affirmation. When he himself was about to be examined, he insisted on being regarded as an accused person, and that, therefore, he ought not to be sworn ; and his objection was properly overruled, as he was not in any legal sense an accused person ; but he never made any objection whatsoever, nor did the ordinary public prosecutor, or anybody else, object to the examination of Sái Narsáppá and Govind Náráyan upon solemn affirmation. In the case of *Birch v. Sir William Somerville (f)*, the Earl of Clarendon, the Lord Lieutenant of Ireland, was examined as a witness on behalf of the plaintiff. The Registrar of the Court administered to the Earl of Clarendon the attestation on honour instead of the usual form of oath. He was examined and cross-examined, and the admissibility of his evidence was unquestioned, until, after a verdict for the defendant, a motion was made to set it aside, on the ground of the evidence having been illegally taken without the sanction of an oath. It was admitted on behalf of the defendant that a Peer of the Realm must be sworn in an action between party and party, if so required, but it was contended that the objection came too late. The Court of Queen's Bench in Ireland was of opinion that the objection would have been good if made in time, but held that it was made too late, and that the plaintiff must be considered as having acquiesced in the taking of the evidence without oath. Several English cases were cited by counsel in that case to the same effect, and in the present case not only has the Crown not made any objection until the matter came up here, but has, independently of the question of lateness, lost its right to object, because it has founded prosecutions, against both Sái Narsáppá and Govind Náráyan, upon the depositions made by them before the Session Judge upon the inquiry—prose-



cutions for giving false evidence, and thus completely waived the objection. The Crown is bound by its conduct in the matter, although it may well be that the prisoners would not be so. It is not for their interest to object, but quite the contrary; and they, accordingly, insist, as under the circumstances they are entitled to insist, upon using the depositions.

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The appointment of Mr. Pritchard as Crown Prosecutor, he having been the Magistrate who tried the case, was a most improper and singular proceeding. To convert a judge into an advocate seeking to uphold his own decision before another tribunal, is, so far as we know, at least in the annals of British jurisprudence, quite unprecedented, and most objectionable, as he has a personal interest in the case, which a public prosecutor should not have. However, looking to the serious reflections upon Mr. Pritchard's character contained in the order for the inquiry, and to the fact that the Judge at first declined to allow him any *locus standi*, and suggested that, in order to obtain one, Mr. Pritchard should be appointed public prosecutor, we are not disposed to severely censure his acceptance of the office proposed for him by the Judge. But we are astonished that the Judge should have done so, and regret that Mr. Ashburner, the Magistrate of the District, should, by making the appointment, have acted on the Judge's proposal. Having accepted the office, Mr. Pritchard ought to have endeavoured to perform its duties with that calmness and impartiality which should ever characterise a public prosecutor. It has been well said by a learned Judge: "The counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the court in the furtherance of justice, and not to act as counsel for any particular person or party" (g). He should not by statement aggravate the case against the prisoners (h), or keep back a witness because his evidence may weaken the case for the prosecution. His only object should be to aid the court in discovering truth (see per Vaughan, J., 9 C. & P. 23). A public prosecutor should avoid any proceeding likely to intimidate or unduly influence witnesses on either side.

(g) 8 C. & P. 269.

(h) Hayes' Crim. Law, 874.



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There should be on his part no unseemly eagerness for, or grasping at, conviction. We deeply regret that Mr. Pritchard should so far have forgotten his duty towards the prisoners, the public, and this court, as to apply to the Session Judge (not only before the result of the inquiry was made known to this court, and the case finally disposed of by it on the evidence then and previously taken, but before the inquiry itself had nearly terminated) for permission to prosecute, before an inferior tribunal, Govind Nárāyaṇ, Sái Narsáppá, and one of their witnesses, Khandu Sing, in respect of the evidence given by them, and the truth of which was to be considered by this court. But again we are more surprised and more grieved to find that the Session Judge so little knew his duty as to grant that permission. The inquiry commenced on the 10th of January. On the 21st of January the sanction to prosecute Govind Nárāyaṇ was applied for and given. On the 23rd of January the sanction to prosecute Sái Narsáppá and Khandu Sing was applied for and given. On the 26th of January they all three were committed for trial by Mr. Edwards, Magistrate F. P., on charges of giving false evidence. The Session Judge—without, as he has since admitted, any lawful authority in that behalf—fixed a special session for their trial, and upon the 27th of January, accordingly, Govind Nárāyaṇ was tried. The Session Judge had actually adjourned for one or more days the inquiry directed by the High Court, in order to facilitate the prosecution, and to allow Mr. Pritchard to attend at it. Such proceedings as these are not creditable to the administration of justice.

The witnesses for the petitioners, on the inquiry, had all been examined before the sanction to prosecute Govind Nárāyaṇ had been applied for. Such witnesses as were subsequently examined were for the Crown. We consider it quite as objectionable to take any step likely to intimidate a witness for the Crown into giving strong evidence on its behalf, as to intimidate a witness for the prisoner so as to induce him to weaken his evidence for the latter. As already intimated, in order to prevent any injury arising to the

petitioners from the course adopted, we decline to take any notice of the evidence of Native witnesses for the Crown, examined at the inquiry after the sanction to prosecute Govind Náráyaṇ was given. They were persons of a class very likely to have been intimidated by the course adopted by Mr. Pritchard.

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Further, assuming, but not deciding, that the Session Judge had power to sanction prosecutions, in respect of evidence taken upon an inquiry such as that in this case directed by the High Court, he has so improperly and illegally exercised that power, that we quash the sanctions given by him so far as they regard Sái Narsáppá and Khandu Sing, the papers having been duly sent for and brought before us for that purpose. We do not quash the sanction in the case of Govind Náráyaṇ, as to do so might deprive him of such benefit (if any) as he may derive from his acquittal by the Assistant Judge.

After rejecting the evidence of Native witnesses for the Crown, taken subsequently to the sanction of the prosecution of Govind Náráyaṇ, we have considered the other evidence taken upon the inquiry, including all of that taken for the petitioners, and we have also considered the evidence upon which the petitioners were convicted, and the various petitions presented in the case in all of the courts into which it has been brought. There have certainly been irregularities in the inquiry, and did we think that any further inquiry was likely to benefit the petitioners, we should not refuse it to them. It has not, however, been alleged, either at the inquiry or since, that the petitioners have been prevented from examining any persons whom they wished to call as witnesses, and their case had been completely closed by their counsel, Mr. Bálá Mangesh Wágle, and the case for the Crown had commenced before the sanction to prosecute Govind Náráyaṇ was given. We do not see any ground, howsoever slender, for supposing that any further inquiry could benefit the petitioners, or that we should benefit them by quashing that which has taken place and directing a fresh inquiry. It is sufficient for this court, when invited to

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exercise its jurisdiction as a Court of Revision, under such circumstances as we have here, if, notwithstanding any irregularities which may have taken place, its conscience is satisfied that the petitioners have had a full inquiry so far as they are concerned, and could not be benefited by further investigation.

We agree with the Judge in thinking that the petitioners have failed to prove that their confessions and pleas of guilty were the result of torture or undue influence. We do not purpose now to go into the details of the evidence and of the case, but only to notice leading facts. The petitioners themselves gave evidence of maltreatment by the police in order to induce them to confess, and that the police tutored them to say what they did say before Mr. Pritchard, and have produced some other witnesses to support them as to maltreatment. The police have been examined, and deny that they in any way maltreated the petitioners. There being this conflict of evidence, we must look to established and admitted facts, and the fair inferences from them. Viewing the confessions themselves, made upon the first occasions on which the petitioners were examined by Mr. Pritchard, when they made their most important statements, these confessions appear to us to be probable and natural, and not like a concocted tale put into the mouths of the parties by the police or others. Further, the petitioners made no complaint to Mr. Pritchard of having been tortured by the police on being brought to him, and they seem to have been ready enough to complain to him when inconvenienced by the police in preventing their servants from cooking for them. Again, one of them was examined by Mr. Ashburner, to whom, in the presence of Major Probyn, the same tale as was told to Mr. Pritchard was repeated. Major Probyn, too, took the very proper precaution of excluding the police from the room during the examination. No complaint of torture or undue influence was then made to Mr. Ashburner or Major Probyn. Nor did the prisoners complain to Dr. Bainbridge, the Jail physician, that either of them had been beaten or tortured by the police. In fact, until they presented their first petition of appeal to the Session Judge, nothing was said on the subject of ill-usage,

and then only in a mild form, such as long travelling through jungles, and “pain-producing circumstances,” and tutoring, to which they said they were subjected by the police. In their supplemental peition, the only passage which sounds in torture is a request for an issue as to whether their confessions were made or taken against their will. It is not, in fact, until their petition was presented to the High Court in September that there was a positive allegation of torture. They there speak of torture and deception as the means by which they were compelled to confess. Through their counsel in November and December they first put forward the most heinous charge—that Mr. Pritchard was present at, and consenting to, their torture. They obtain an inquiry, and do not themselves attempt to give, or produce any other person to give, so much as a scintilla of evidence to support the assertion, that Mr. Pritchard was a party to the cruel and revolting practices attributed to him and the police. This circumstance alone would go far to discredit their case, but, taken with the others, satisfies us that we cannot place any reliance even upon what they have said with regard to the police alone.

As to their being prevented from communicating with their *vakils* when in Mr. Pritchard's camp, we have come to the conclusion, upon the evidence, that this is not true, and that their negotiations with the *vakils* were broken off, either because they felt that after confessing they had no need for professional services, or because they could not come to any agreement with the *vakils* as to the terms of their remuneration. We think it right here to say that, although it is quite proper that sufficient means should be adopted to prevent prisoners from escaping, when holding an interview with their *vakils*, police or other persons should not be placed sufficiently near to overhear their conversation. We regret to find in his own evidence that Mr. Pritchard permitted himself to charge the *vakils* with coming to his camp to tout for clients—a taunt which should not, under the circumstances, have been uttered by a Magistrate. The *vakils* had been sent by the friends of the accused. We further regret

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to learn from his own evidence that Mr. Pritchard applied an opprobrious epithet to the prisoners or one of them. A Magistrate who thus comports himself towards persons brought before him for trial, and towards their professional advisers, must not be surprised if unpleasant opinions are expressed as to his mode of executing his office.

We do not perceive that there was any necessity for causing the petitioners to be conveyed from place to place, for a period of about six weeks, for long distances, at the hottest season of the year, or why Mr. Pritchard should not have tried them at one place. We see no reason for differing from the opinion of the Judge, who held that the petitioners were more frequently handcuffed than was necessary. They do not belong to castes physically formidable or violent, and do not appear to have attempted to escape from their guards either by means of force or corruption.

It was contended for Sái Narsáppá and Govind Náráyan that they were entitled to the benefit of the point of law decided in favour of Káshináth Dinkar, in Secs. 201 and 109 of the Penal Code. For the Crown, however, it was argued that, although it may be true that the abetment of the destruction of evidence of a man's own crime may not be an offence, yet that here the books destroyed were not only evidence of the crime of themselves, but also of the crime of others—for example, of Sháligráma and their other accomplices. The point is one of some difficulty, but it is not necessary that we should determine it, as we think that, in the confessions of Sái Narsáppá and Govind Náráyan there is copious evidence of their abetment of cheating by Sháligráma and others, and thereby inducing the delivery of property, against Sec. 420 and Sec. 109 of the Penal Code, and the punishment awarded to them by Mr. Pritchard (which we think to have been a fair and moderate one) does not exceed that to which he had power to sentence them for abetment of cheating, and thereby inducing the delivery of property; and, therefore, under Sec. 426 of the Criminal Procedure Code, a Court of Revision or of Appeal could not properly interfere with the sentences already passed.

But it was further said that the abetment by one of the petitioners (Govind Náráyaṇ) of cheating (if any) took place in the Násik collectorate, and that Mr. Pritchard had no magisterial jurisdiction in Násik, and, therefore, that the conviction and sentence of Govind Náráyaṇ, at least, must be set aside. It is perhaps not very clear on the evidence as to whether the cheating abetted by him, or the abetment of it, took place in Násik or in Khándesh, but it is unnecessary for us to determine positively in which of the two collectorates these offences or either of them was committed; inasmuch as we think that the order of Government of the 19th July 1869, which appeared in the *Bombay Government Gazette* of the 20th of July 1869, and which is as follows:—

“All persons who, as holding office or resident within the portions of the Khándesh and Ahmednagar collectorates which have been transferred to the Násik collectorate, have been vested with all or any of the powers of a Magistrate or Subordinate Magistrate, or with special powers conferred under any law, shall continue to exercise the same powers in the Násik magisterial district. By order of the Right Honorable the Governor in Council. (Sd.) C. GONNE, Secretary to Government”—conferred the authority of a Magistrate, F. P., on Mr. Pritchard in the new collectorate of Násik, he then (19th July 1869) being within the terms of that order, as holding office in the portion of the Khándesh collectorate which was transferred to the Násik collectorate, and vested with the powers of a Magistrate, F. P., in Khándesh. He continued for some time afterwards to hold his office of Assistant Collector, and although subsequently his performance of duties as a revenue officer was limited to Khándesh, yet he never was divested of the magisterial powers in the new collectorate of Násik conferred upon him by the order of the 19th of July 1869. There certainly is the difficulty at first felt by my brothers Lloyd and Kemball as to the position of the Collector and Magistrate of the district of Khándesh with respect to Násik, but it is not, we think, so great as to induce us to cut down the language of the order, which is sufficient to confer the magistracy, F. P., upon Mr. Pritchard, circumstanced as he then was.

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For the foregoing reasons, we decline to interfere with the convictions of, and sentences upon, Sái Narsáppá and Govind Náráyaṇ.

It remains for us to say a few words upon the petition presented by Mr. Shántáráṁ Náráyaṇ on behalf of Mr. Anstey, who was summoned from Bombay as a witness on behalf of the Crown, on the application of Mr. Pritchard, to the inquiry at Dhuliá before the Session Judge. Mr. Shántáráṁ Náráyaṇ was also summoned, and attended. Mr. Anstey was only served with the summons in Bombay on the day before that named for his attendance in Dhuliá, so it would not have been possible for him to reach Dhuliá at the time appointed. The application for his attachment for disobedience to the summons was made by Mr. Pritchard, but rightly refused by the Session Judge. It is to be inferred from the original application for the summonses to these gentlemen, which was not only *ad testificandum*, but also that they should bring with them their briefs and instructions, &c., and, from the nature of the examination of Mr. Shántáráṁ Náráyaṇ by Mr. Pritchard, that the object of the latter gentleman in serving out the summonses was to ask for a discovery from Mr. Anstey and Mr. Shántáráṁ Náráyaṇ of the instructions given by their clients, the petitioners, to them. Now such instructions the counsel, attorney, or pleader is not at liberty to disclose without the consent of the client, and such a consent could not be rightly sought for or accepted from accused persons. Sec. 24 of Act II. of 1855, referred to by Mr. McCulloch as being sufficiently vague to justify Mr. Pritchard in supposing that the latter part of it entitled him to say that by giving evidence the petitioners had waived their privilege, most clearly applies to civil proceedings only, the word "a suit" never being applicable to a criminal proceeding. We are not prepared to controvert with much earnestness the opinion expressed by the Session Judge, when refusing the application of Mr. Pritchard for an attachment of Mr. Anstey, that the summonses were originally applied for merely for vexatious purposes,—a measure which, if intended to be retaliatory on the



part of a public prosecutor and a magistrate, we must regret, although it cannot be affirmed that it was without serious provocation. The privilege is well known, and existed long before Act II. of 1855 was passed, or the Legislature which passed it came into existence. It may not be inappropriate to mention here that in *Dicas v. Lawson* (i), a rule for an attachment against Lord Brougham for a contempt of the Court of Exchequer in not appearing as a witness, in pursuance of a subpoena, was refused, the affidavit not showing how his evidence could be material, and the fact being that it could not have been material. Lord Abinger, C.B., said the court would not grant an attachment, or allow its process to be used, for purposes of needless vexation. We think that the Session Judge ought, before issuing the summonses, to have ascertained from Mr. Pritchard for what purpose he needed the attendance of witnesses from so great a distance as Bombay, and, if not satisfied that they were legitimately required, to have refused to issue the summonses.

The Original Jurisdiction Side of the High Court, in this respect following the practice of the Supreme Court, never allows a subpoena to issue into the Mofussil without the special permission of a Judge, which is not given unless fair reasons be shown to him for supposing that the attendance of the proposed witness is necessary. Sir M. Sausse once imprisoned an attorney's clerk for a fortnight for having obtained in Bombay, and caused to be served in Alsbág, subpoenas without the permission of a Judge, and in defiance of the general rule of court, which renders such permission indispensable, whereby some very poor persons were brought to Bombay and detained for a long time. In a criminal case when the witness is needed for the defence, the Judge, of course, is cautious not to refuse the subpoena if anything like a fair reason be shown for the attendance of the witness.

Lastly we should observe, with reference to circumstances mentioned in the record in this case, that it is not desirable that Magistrates whose decisions are under appeal, or who have been engaged in promoting the prosecution, or officers of police concerned in the case, at the hearing should sit

(i) 1 C. M. & R. 934.

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beside or near the Judge, or should converse with him, and we consider the verbal communications and notes which passed between the Magistrate and the Judge in this case highly irregular, and, if such a practice be persisted in, as calling for serious action. If there be any fact supposed to be in the knowledge of the Magistrate and which the Judge considers necessary for the proper determination of the case before him, he should examine the Magistrate as a witness, upon oath or solemn affirmation, according to his creed.

My brothers Melvill and Green, who are engaged in other Division Courts to-day, as well as my brothers Lloyd and Kemball, concur in this judgment.

REG. v. IRA'PA' bin BASA'PA' *et al.*

Nov. 23.

*Report of Subordinate Magistrate—Credible Information—Evidence of a Breach of the Peace being likely—Security to keep the Peace—Crim. Proc. Code, Secs. 280, 287, and 288.*

The report of a Subordinate Magistrate, although it is credible information on which a Magistrate of the District would be justified, under Sec. 280 of the Code of Criminal Procedure, in issuing a summons, is not evidence on which he can properly arrive at a conclusion that the accused is likely to cause a breach of the peace.

Secs. 287 and 288 of the Code require that evidence in such a case shall be recorded, and if none is forthcoming security to keep the peace should not be demanded.

THE accused were ordered by the District Magistrate of Dhárwár, E. P. Robertson, to enter into a personal recognisance to keep the peace, and in addition to give securities. This order having been confirmed by the Session Judge, Baron DeH. Larpent, this application for the Court's extraordinary jurisdiction was made.

The circumstances under which the order was made are briefly these.

In the little village of Lakundi, in Táluká Dambal, an annual fair is held in honour of a deity, whose car is on that occasion drawn by the inhabitants and paraded through the streets. A small faction, lately sprung up in the village, and represented by the accused, having objected to the procession going by the usual route, the Subordinate Magis-

trate inquired into the matter and informed the Magistrate of the District, by a written report, that if the fair should be held and no precautions taken, the accused would assuredly commit a breach of the peace.

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The District Magistrate, upon receipt of this report, issued summonses to the accused to show cause why they should not enter into a bond to keep the peace. The accused appeared on the appointed day before the Magistrate, who recorded the report of the Subordinate Magistrate, and, without taking any more evidence, directed each of the accused to enter into a personal recognisance and to furnish two sureties in the sum of Rs. 200 each.

The Acting Session Judge, before whom the case came on appeal, considered that the taking of security was entirely within the Magistrate's discretion, and refused to interfere.

The application was heard by GIBBS and LLOYD, JJ.

*Nánábhái Haridás* for the petitioners.

PER CURIAM:—The period for which the security was furnished has expired, owing to the delay which has occurred in calling for the reports and proceedings. But as the Court considers that the procedure of the District Magistrate was illegal, it will record its opinion for future guidance. The District Magistrate did not record any evidence when the parties were before him, but contented himself with the report of the Subordinate Magistrate that a breach of the peace was likely to occur. Now this, although credible information, on which he could, under Sec. 280 of the Code of Criminal Procedure, call on the parties to appear and show cause, was not evidence on which he could arrive at a conclusion, when the parties were present in his court, that they were likely to cause a breach of the peace. Secs. 287 and 288 require a judicial proceeding,—i.e., evidence to be recorded—and if none could be found, security could not be demanded. The question is very fully discussed in the case of *Behari Patak v. Mahomed Hyat Khan* and two other cases (a), and the same course was directed by this court in *Reg. v. Dalpatráam Pemábhái* (b).

*Order accordingly.*

(a) 4 Beng. L. Rep., F. B. R. 46. (b) 5 Bom. H. C. Rep., Cr. Ca. 105.

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REG. V. CHIMA'.

*Evidence—Attempt to murder—Ind. Pen. Code, Sec. 307—Improper Admission of Police Evidence.*

A young Bráhma widow was confined of a child. The chief constable of police, acting, as he stated, on information that the accused was about to kill a baby, went to search her house with a number of men, and found her lying on the first floor, and discovered on the second floor a living newborn child wrapped up in a cloth with a cooking pot turned over it.

The Session Judge convicted the accused of attempt to murder.

The High Court on appeal reversed the conviction, on the ground that the evidence was insufficient to support it.

It was also held in this case that the chief constable's statement, that he "had information that the accused was about to kill the baby," was most improperly admitted as evidence against the accused.

Action of the Police censured.

When a person abets the commission of an offence and is present at the time when it is committed, he should be tried, under Sec. 114 of the Indian Penal Code, for the same offence as the principal.

THE accused, Chimá, was tried and convicted by W. M. P. Coghlan, Session Judge of Tháná, of attempting to commit murder, and sentenced, under Sec. 307 of the Indian Penal Code, to rigorous imprisonment for a period of seven years.

The facts of the case sufficiently appear from the following extracts from the decision of the Session Judge :—

"The circumstances of the case may be given from the deposition of Shekh Amír, chief constable of the Násik town police.

"He has told us that, in consequence of information he had received, he went to search the house of the accused persons (Chimá and her mother, Jánki) about noon on the 5th of March. He had with him constables and five Hindú persons to be witnesses of what might be found in the house.

"The door was shut, and not opened until he had called out for a considerable time; at length it was opened by accused No. 2, Jánki.

"The party went upstairs to the first floor, where they found Chimá, accused No. 1, lying on the floor. After hesitating, she admitted that she had been confined of a child

on the second floor, and that it was then there. The *pan-cháyat* and two constables went upstairs with Jánki, accused No. 2, and returned with a *lugdá* in a bundle and a copper cooking-pot. The *lugdá* was unrolled, and in it was found a living new-born female child, unwashed since birth, and with its navel-string untrimmed. The chief constable had sent for two women, Ourí and Kási (witnesses Nos. 4 and 5), the former of whom tried to squeeze milk into the infant's mouth, and in doing so found in the mouth a piece of cloth, probably a strip torn off a *lugdá*, rolled up tightly in the infant's mouth. Kási cut the navel-string. The child lived for nearly three weeks and then died, as far as is known, from natural causes. The witness No. 3, Sakháram, one of the *pancháyat*, who went up to the second floor, deposes to the child being found wrapped up in the *lugdá* before the court, in the copper vessel, which was turned bottom upward.

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“As the *lugdá* lies in a heap before the court, it is at least half as large again in bulk as the copper pot. It must, therefore, have required pressure to get the whole *lugdá* into the vessel, especially together with an infant. I am only surprised that the child was taken out of the vessel alive, and can only account for it by supposing that she had only been there for a few minutes.

“The accused, Chimá, admits all these circumstances, but would have it believed that the child was only put in the *lugdá* temporarily, and without intention to kill it, and that the piece of rolled cloth must have accidentally got into the mouth. The learned Pléader, who has gratuitously conducted the defence, would more ingeniously account for the rag by supposing that it had been used to feed the child with, and had accidentally been left in the mouth.

“I cannot adopt this hypothesis as to the rag, which is a long strip of *lugda*, or agree with the Assessors that the position in which the child was found is consistent with any theory but that it was intended to die in the *lugdá* in the copper vessel.

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“ It is argued that had Chimá, accused No. 1, wished to kill the child she might have done so by a pinch on the throat, and need not have gone to the trouble she did. The answer to this is that the plan she adopted was a much safer one than any other. Had the police not found the child when they did, it would have been quickly dead without any mark of violence on it. It was probably also more agreeable to accused Chimá's feelings, as it were, to let the child die, rather than to kill it by absolute force. It is quite clear to me, beyond a reasonable doubt, that the accused No. 1, Chimá, did her best to kill the child. There is reason for grave suspicion that her mother, Jánki, accused No. 2, abetted the offence ; but there is not sufficient proof to warrant a conviction in her case. She pointed out the place where the child was found ; but this was after Chimá had said that the child was upstairs. She must, therefore, be acquitted.

“ The chief constable of the city police, Shekh Amir, deserves credit for his arrangements, as shown by the evidence in this case.”

The trial was conducted by the aid of three Assessors, who differed from the Session Judge in his opinion regarding Chimá's guilt.

Against the conviction and sentence of the Session Judge, Chimá appealed to the High Court, and the appeal was heard before GIBBS and WEST, JJ., on the 6th of July 1871.

*Dhirajlál Mathurádás* in support of the conviction.

WEST, J. :—The evidence in this case is quite insufficient to sustain the serious charge upon which the prisoner Chimá has been convicted. It is in evidence that the police found the inner door of the house closed and fastened when they arrived, and Chimá had just been delivered of the child. The door was not opened for about twenty minutes. Under these circumstances, the view taken by the Assessors seems the most rational one, namely, that in their consternation at the irruption of a number of strange men, and under the influence of sudden dread and surprise, Chimá and her

mother wrapped the infant up in a cloth and turned a pot over it, simply by way of concealing it from view. The piece of cloth found in the mouth may not improbably have been introduced merely as a gag to prevent the child's cries from revealing its presence, and without any homicidal intent. Had there really been such an intent, it might easily have been given effect to, and it must not be too readily assumed against the strong impulses of nature even in the case of a Bráhmaṇ widow towards her illegitimate child. The Session Judge has complimented the chief constable of the city police at Násik on the efficiency of his arrangements in this case. But it does not appear that there was really any necessity for these arrangements at all. His interference, if it was not purely officious, might, at any rate, have easily been made superfluous by a private intimation to Chimá that her condition was known, and that anything unusual in the result would be looked on with suspicion. She does not appear to have in any way concealed her pregnancy, and the irruption of a band of men while she might be in the very crisis of childbirth was calculated to do much more harm than good. It was, indeed, quite unjustifiable, seeing that Chimá did not by her incontinence, discreditable as that no doubt was, forfeit the right of a human being and a British subject to veil her weakness and her shame in the seclusion of her private apartment. The chief constable's statement that he "had information on the 5th that the accused were about to kill the baby" was most improperly admitted as evidence against the accused. It turned out on further inquiry to be no information at all, but a mere police inference, drawn partly from a fact lending no real support to it, and partly from a fact which was quite imaginary—probably invented in court on the spur of the moment. The Court, therefore, cannot agree with the Session Judge in commending the chief constable's interference in such a manner and on such a ground. The Session Judge altered the charge from one of attempt at murder against both the accused into one of attempt as against Chimá, and of abetment of murder as against Jánki. But if Jánki was

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1871. present facilitating the commission of Chimá's offence, her  
 REG. offence, according to Sec. 114 of the Indian Penal Code, was  
 CHIMÁ' identical with Chimá's, and as there could be no extenuating  
 circumstance in her favour that would not operate in her  
 daughter's favour also, the charge against her should not  
 have been reduced to one of a less serious character without  
 any alteration of that against the daughter. The Court  
 reverses the conviction and sentence passed against Chimá,  
 and directs that she be discharged.

*Conviction and sentence reversed.*

Aug. 31.

REG. V. KA'SHINA'TH BACHA'JI BA'GUL.

*Defamation—Ind. Pen. Code, Sec. 499, Exceptions 8 and 10—Letter  
 written to protect Religious Interests of Writer—Good Faith.*

A letter written by a Bráhmaṇ to the Bráhmaṇ community of the neighbourhood, with a view to obtain their decision on a matter affecting his own religious interests and that of the Bráhmaṇ community, if written in good faith, falls within Exceptions 8 and 10 of Sec. 499 of the Indian Penal Code.

THE Acting Assistant Session Judge of Tháná, George Ayerst, convicted the accused, Káshináth Bacháji Bágul, of defamation (under Sec. 499 of the Indian Penal Code), and sentenced him to pay a fine of Rs. 200, or in default of payment three months' simple imprisonment. Káshináth paid the fine.

The alleged defamation was contained in a letter which the accused, with several other persons, signed on the 8th of January 1871, and sent to the heads of the Bráhmaṇ community at Birváḍi, in the Mahád táluká. The following extracts from the translation of the letter sufficiently show its import and the circumstances under which it was written :—

“TO ALL THE BRA'HMAN'S OF KASBE BIRVA'DI.

“Moro Vishvanáth Bágul, Káshináth Bacháji Bágul, and others, beg to inform you that we received your letter dated Poush Shudh, addressed to Moro Vishvanáth. The reply to it, and the other circumstances, are as follows :—



“ On information being received by us that Trimbak Hari Joshi, grandson of Janárdan Joshi, had committed adultery with a woman of the lowest caste, inquiries commenced in our village, when several began to endeavour to prove falsely the innocence of the said Joshi. In the committee assembled, instead of taking proper proof and duly considering it, several gentlemen joined the Joshi through influence, and wrote a letter to the Mahád men, stating that it was merely an accusation, and asking them how they were to act in it, and signed the same, and obtained the signatures of others through deceit, and did not take the signatures of those who were opposed to it. On this letter being sent to Mahád, we wrote another letter against it, signed by the villagers, to the Mahád men, who in reply required us to be there with proof. On which we stated the origin of the matter, as it existed, with other circumstances, at length, as came to our knowledge, and sent it to them with their letter and other depositions taken at Satván, and on the day appointed to assemble at Mahád we went there with the witnesses, &c., in the matter. The meeting assembled at Mahád, and the inquiries commenced, when I mentioned my evidence, and stated honestly on oath all the circumstances, which the Mahád men disregarded *in toto*, and took the deposition of the woman alleged to have been in adultery, and one or two other Maháras brought by the accused at his expense, with an intention to prove the falsity of the charge against the Joshi. But although the witnesses told lies, yet their lies might have turned out true had their statement been written as given; but they were written keeping the Joshi in mind. But what of that? Can it be applauded by sages? Those who looked to the real things saw at the very time that the matter regarding the Joshi was not maturely considered, and that the depositions were false, &c. Such was the matter. Therefore, we are so much convinced of the Mahád assembly, that, however the matter might stand, they meant to acquit the Joshi Báwá. We declare from the above circumstances that the above inquiry was not conducted impartially.

\* \* \* \* \*

“ We have communicated to you these things as they took place, and we are satisfied that they are true. We did not communicate them to you through animosity, or with the intention that a Bráhmaṇ should be found guilty. We did so thinking that otherwise our religion should be polluted this very day. The Almighty, Who lives in the hearts of all, is witness to this. This fact will be seen by Him, Who will consider it impartially. That it is true will also be seen on a minute inquiry in Vinhere and all the villages near it.

\* \* \* \* \*

“ If you will ask why the persons living in the accused's house be also considered guilty with him, then, from the papers sent (it will be seen that) all the persons, including the principal offender, are of one mind, and it will be seen as stated that they purified him by applying coddung (to his body).

“ We do further inform you that to this day the principal offender, Trimbak, has been taking meal, water, &c. with and from the members of his family, and the Joshis who have built the temple of Shrishankar do

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1871. allow him as yet to worship the god. Therefore, it should also be considered what persons are guilty, and of what offences.
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- \* \* \* \* \*
- "I have informed you of this with the intention that the offence committed may not spread among all the Bráhmans, and that all should not be ruined. It is not proper that I should walk through every village with the evidence of it, because it is the business of the whole caste. They should make inquiries, and take the evidence that can be obtained. We have given the details of the facts, happened as they came to us. It is yours to consider all this.
- "It appears that other caste men of the surrounding villages are taking steps not to call the Joshi, he being the village priest.
- \* \* \* \* \*
- "MORO VISHWA'NATH BA'GUL,  
KA'SHINA'TH BACHA'JI BA'GUL  
and others.

The complaint in this case was preferred, not by Trimbak, but by the woman Nági. The Assistant Session Judge recorded the following reasons for finding Káshináth guilty of defamation :—

"He (Káshináth) has admitted having signed the letter. This letter is addressed to all the Bráhmans at Birvádi, and was read aloud at a public meeting in Mahád. The general purport of the letter is to impute unchastity to a Bráhmaṇ by name Trimbak, and a low-caste woman, who is proved by other evidence to be a Mahárin, named Nági, the complainant in this case, with reference to a rumour that they had adulterous intercourse together. It has been argued for the accused that this was done with no bad intention, but merely in the interests of the Hindú religion. I think that is an offence within the definition of Sec. 499 of the Indian Penal Code, and, in my opinion, none of the exceptions therein specified apply to the present case. Starling (Indian Criminal Law and Procedure, page 369) lays down that 'in all cases where the matter is defamatory in its nature, the *onus* of proving the truth of the statement, or at least that he had reasonable grounds for believing it to be true, and was actuated in making such a statement, not by malicious motives, but by intelligent zeal for the public interests, lies on the person making the statement.' He must, therefore, in such cases first prove the truth, or his

reason for believing the truth, thereof; but in this case not a tittle of evidence has been offered in support of the truth of this most calumnious allegation. No such imputation, unless made on reasonable grounds, can be held to be made for the public good. It is pleaded that these persons are Hindús, and as such were justified in circulating this rumour in the interests of their religion. I know, however, of no especial law exempting Hindús from the operation of Secs. 499 and 500, and if they choose to make rash and unfounded assertions or imputations against the characters of others they must bear the penalty provided by the law. The general purport of this letter is that, although the charge brought against Trimbak was held by the caste not to have been proved, yet he was wrongfully acquitted, the charge being that of committing adultery with Nági. By this the characters of both persons are aspersed."

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From the conviction and sentence passed by the Assistant Session Judge the accused, Káshináth Bacháji, preferred an appeal to the High Court. The appeal was argued before MELVILL and KEMBALL, JJ., on the 31st of August 1871.

*Nánábhái Haridás* (with him *Bhairavnáth Mangesh*), for the accused, Káshináth Bacháji :—The letter alleged to have been sent to the Bráhmans of the village of Birvádi is not defamatory. As having been written in accordance with the customs and usages prevailing among Hindús from time immemorial, in good faith, and for the protection of the religious interests of the Hindús in general, and of the writers in particular, the case clearly comes within the ninth exception of Sec. 499 of the Indian Penal Code. The letter does not show that it was the intention of the writers to injure the character of the woman Nági, nor is there one single word in it to indicate that she was the person intended. The decision of the Assistant Session Judge is opposed to the weight of evidence.

*Dhirajlál Mathurádás* (Government Pleader) appeared in support of the conviction and sentence.

PER CURIAM :—The Court thinks it doubtful whether the letter can be considered defamatory of the complainant, Nági,

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| 1871.<br><hr/> REG.<br>v.<br>KA'SHINA'TH<br>BACHA'JI<br>BA'GI'L. | who is not named in it, nor indicated by any more direct expression than "a woman of the lowest caste." The person really defamed, if any one, was Trimbak, who has not come forward to complain : and his unwillingness to do so gives an unsatisfactory aspect to the case. But, however this may be, the Court is of opinion that the object of the prisoner having been to obtain a decision from the Bráhmaṇ community of the neighbourhood on a matter affecting his own religious interests and that of the Bráhmaṇ community, the appellant is entitled to the benefit of Exceptions 8 and 10, Sec. 499 of the Indian Penal Code, if the letter was written in good faith ; and on review of all the circumstances of the case, the Court is not prepared to say that the letter was written otherwise than in good faith. |
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*Conviction and sentence reversed.*

# AN INDEX

## TO THE

## PRINCIPAL MATTERS.

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### ABANDONMENT OF RIGHTS BY MANAGING KHOT—

*Held that*, in the absence of evidence of custom rendering the act of one sharer in a khotship (which act involved the sacrifice of important rights) binding upon his co-sharers, a managing *khot* has, without the assent of his co-sharers, no power to give up rights which belong to them as well as himself. *The Collector of Ratnágiri v. Vyankatráo Náráyan Surve* .....A.C.J. 1

ABETMENT OF OFFENCE.—*See* EVIDENCE.

ACCOUNTS.—*See* EQUITY OF REDEMPTION.

ACCOUNTS REFERRED TO MASTER. — *See* COMMISSION UPON SALES,

### ACCOUNT STATED—

Although to make an account a stated account it is not necessary that it should be signed, yet unless it is signed by the debtor the intention and effect of Sec. 4 of Act XIV. of 1859 is to prevent it being made the foundation of an action to recover a debt which would otherwise be barred by that Act.

Where there has been a running account between the plaintiff and the defendant, consisting of advances

made by the former, and part-payments by the latter, the plaintiff is entitled to recover only in respect of advances made by him within three years preceding the institution of his suit, but he has a right to appropriate any payments made within that time to the reduction of the general balance, even though the recovery of such balance may be barred by time. *Mulchand Gulábchand v. Girdhar Mádhav et al.*

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STATUTES.  
ACTS, CONSTRUCTION OF—

In order to impose a tax, due, rate, or toll upon a subject, the framers of the Act or Bye-law under which such tax, &c. is imposed must use clear and unambiguous words to effect their purpose. When the words used are ambiguous, the intendment of the courts will be in favour of the subject upon whom the tax is sought to be imposed.

Thus where the framers of the Súrat Bye-laws imposed a tax of one rupee per Súrat *man* upon "copper" imported into Súrat for consumption, it was held that copper wrought up into pots did not fall within the words of the bye-law.

*Semble* that when a tax is imposed upon goods imported into a town for consumption, and such goods, after having been subjected to the tax upon being imported into the town, are afterwards taken out for sale into the neighbouring villages and brought back unsold, such goods are not liable to be subjected to tax a second time. *Dullabh Shiwál v. T. C. Hops*. A.C.J. 213

ACTUAL KNOWLEDGE.—*See* INDIAN SUCCESSION ACT, SEC. 282.

ADMINISTRATOR. — *See* INDIAN SUCCESSION ACT, SEC. 282.

ADMINISTRATOR GENERAL'S ACT.—*See* ADMINISTRATOR OF THE ESTATE OF A DECEASED HINDU'.

ADMINISTRATOR OF THE ESTATE OF A DECEASED HINDU'.

The legal *status* of the administrator of the estate of a deceased Hindú, as compared with the legal *status* of the administrator of the estate of a deceased person who in his

lifetime was governed by English law, pointed out.

When ordinary letters of administration to the estate of a deceased Hindú are granted to the Administrator General under Act XXIV. of 1867 (but not under Sec. 17 of that Act), his title does not relate back to the death of the deceased, nor to the date of the Judge's order directing such letters to be issued, but accrues only as from the date of the grant of such letters.

*Quære*—whether, if letters are issued to the Administrator General under Sec. 17 of that Act, the case would be otherwise, or his powers greater.

Where a Hindú died leaving a widow and no male issue, and two of the creditors of the deceased brought suits against such widow as the legal representative of the deceased, and attached before judgment certain property of the deceased and afterwards obtained judgments against the widow, an application on behalf of the Administrator General, who at the widow's request, but after the judgments were obtained, took out letters of administration to the estate of the deceased, to have such attachments removed, was refused, though the Judge's order, directing that the letters should be issued to the Administrator General, was prior in time to the passing of the judgments; and the judgment-creditors were held entitled to be paid out of the property attached, so far as the same proved sufficient for that purpose. *Lálchind Révdayál v. Gumtibái*; *Ghellá Pemá and others v. Gumtibái*. O.C.J. 140

ADMISSIBILITY OF CONFESSION IN EVIDENCE.—*See* CONDITIONAL PARDON.

ADMISSIBILITY OF EVIDENCE.—*See* CONFESSION.

ADMISSION MADE IN A DEPOSITION—

A written contract can only be proved by the production of the writing itself, and if the document is inadmissible from want of registration, no secondary evidence of the contract can be received.

A party's admission as to the contents of a document not made in the pleadings, but in a deposition, is secondary evidence, and cannot supply the place of the document itself. *Shekh Ibráhim v. Parvátí valad Hari*. .....A.C.J. 163

ADOPTED SON.—*See* ADOPTION.

ADOPTION—

An adopted son does not stand in a better position, with regard to the self-acquired immoveable property of his adoptive father, than a natural-born son would occupy; and there is nothing in the Hindú law in this Presidency to prevent a father from disposing by will of his self-acquired immoveable property, and so defeating the rights by inheritance of his adopted son. *Purshotam Shámú Shenvi v. Vísudev Krishná Shenvi*. O.C.J. 196.

*See* STRÍDHAN.

ADOPTION BY WIDOW—

1. According to the Hindú law obtaining in Western India, the adoption of a *Shúdrú* who is married at the time of his adoption is not invalid if the adopted person be

a *sagotra* (of the same family) of the person adopting.

A son adopted to her husband by a widow is entitled to set aside a gift of ancestral immoveable property made by his adoptive father's widow previous to his adoption. *Nátháji Krishnáji v. Hari Jagoji*.

A.C.J. 67

2. Although, as a general rule, the adoption by a Hindú widow of a son to her deceased husband is in the Maráthá Country good without the consent of her husband's kinsmen, when the estate of her husband is vested in her or in her and her co-widow jointly, yet when such adoption has the effect of divesting an estate already vested in a third person, (e.g.) the widow of her husband's deceased brother, the consent of such third person would appear to be necessary to give validity to such an adoption.

*Rakhmábái v. Rádhúbái (a)*, and *The Collector of Madura v. Muttu Ramalinga Sadhupathy (b)*, commented on and compared. *Rupchand Hindumal v. Rakhmábái*.

A.C.J. 114

ADULTERY DURING MARRIAGE.

—*See* INDIAN DIVORCE ACT, SEC. 14.

ADULTERY OF WIFE PROVED AFTER ORDER FOR MAINTENANCE MADE.—*See* MAINTENANCE ORDER.

ADVOCATE. — *See* PRIVILEGE OF SPEECH.

AGREEMENT VOID FOR MAINTENANCE.—*See* MAINTENANCE, 1.

ALIENATION BY NATURAL GUARDIAN—



A Hindú widow is the proper guardian of her deceased son's widow, in the absence of any person claiming a preferential title to succeed to the estate of the latter.

An alienation, by the natural guardian, of a ward's immoveable estate made without having obtained a certificate under the Minors' Act is invalid.

The Court, while declaring such an alienation invalid, will, under special circumstances, order the ward to repay the amount of the purchase-money paid to the guardian, before setting aside the sale and directing the alienated property to be made over to the ward.  
*Bái Kesar v. Bái Gangá.* A.C.J. 31

#### ALTERNATIVE CHARGE—

In order to make an alternative charge of two or more offences regular under Sec. 242 of the Crim. Proc. Code the offences specified in such alternative charge must all be offences against the Indian Penal Code. Therefore, a charge against a prisoner either of "criminal breach of trust" under Sec. 409 of the Indian Penal Code, or of "undue exaction of money" under Sec. 16 of Reg. XVII. of 1827, is irregular.

An offence under the latter section, being punishable by imprisonment for seven years, is triable exclusively by a Court of Session, under the provisions of the Schedule of the Code of Criminal Procedure Amendment Act (VIII. of 1869), last page. *Reg. v. A'jam Dullá et al.* .....CR. CA. 115

AMBIGUOUS WORDS.—See ACTS, CONSTRUCTION OF.

APPEAL.—See AWARD, 1. COSTS, 1, 2. EX PARTE JUDGMENT.

ARBITRATION.—See AWARD, 1.

ARBITRATORS.—See AWARD, 2.

ASSESSMENT.—See MA'L LAND. REVENUE SURVEY.

ASSIGNEE FOR VALUE WITHOUT NOTICE.—See ATTACHMENT OF DEBT.

ASSIGNMENT IN EQUITY.—See READINESS AND WILLINGNESS TO DELIVER.

ASSIGNMENT OF FUNDS, EXPECTED TO REACH HANDS OF A THIRD PERSON, VALID.—See ATTACHMENT OF DEBT.

ASSIGNMENT TO TRUSTEE.—See JURISDICTION.

A'SURA MARRIAGE.—See STE'DHAN.

#### ATTACHMENT AGAINST PERSON OR GOODS—

A Názar or Sheriff cannot, under a writ of attachment, break open a defendant's dwelling-house to execute civil process against his person or goods if the outer door is closed and locked, even when he finds that the defendant has absconded, to evade such execution.

The privilege extends to a man's dwelling-house or out-house or any office annexed to the dwelling-house, but not to a building standing at a distance from the dwelling-house and not forming parcel of it.

If, however, the outer door of the defendant's dwelling-house be open and the Sheriff or Názar enter, he may afterwards break an inner

door to take the goods. *Bái Kuvar v. Venidás Gangáram.*

A.C.J. 127

#### ATTACHMENT BEFORE JUDGMENT—

The High Court has no power to attach before judgment a defendant's property situate outside the limits of its ordinary original civil jurisdiction. *Háji Jivá Nur Muhammad v. A'bubakar Ibráhim Meman..* .....O.C.J. 29

#### ATTACHMENT OF DEBT—

A creditor, who attaches a debt due to his judgment-debtor, is not in the same position as an assignee for value of such debt without notice of a prior assignment, but in respect to prior assignments stands in no better position than his judgment-debtor. An assignment prior to attachment that is good against the judgment-debtor is also, as a general rule, good against his attaching creditor.

Notice to the holder of funds is not necessary to complete, *as against the assignor*, an equitable assignment of such funds.

In August 1870, Rámji Joitá signed and gave to Messrs. F., S., & Co. a letter addressed to Messrs. Ewart, Latham, and Co., by which he "requested them to pay over to Messrs. F., S., & Co. any surplus proceeds of his consignment of one hundred bales per 'Aurora,' after recovery from the underwriters of the amount due under a policy of insurance" (which had been effected on the hundred bales), after making certain deductions.

This letter was given to Messrs. F., S., & Co. in consideration of a pre-existing debt.

On the 8th of August 1870, Messrs. F., S., & Co. sent the letter to Messrs. Ewart, Latham, and Co., with a request that they would act upon it.

The surplus proceeds of the insurance of the one hundred bales reached Messrs. Ewart, Latham, and Co. on the 26th of June 1871, and were attached in their hands by a judgment-creditor of Rámji Joitá before they were paid over to Messrs. F., S., & Co.

*Held.* That Rámji Joitá had validly assigned the surplus proceeds of the hundred bales to Messrs. F., S., & Co., and that such assignment was valid as against subsequent attaching creditors.

*Semble.* That an attachment upon such surplus proceeds before they reached the hands of Messrs. Ewart, Latham, and Co. from the underwriters would have been invalid.

*Held.* That a letter by which a *chose in action* (a debt) was equitably assigned did not require a stamp where the *chose in action* was not in British India at the time of the assignment. *Megji Hansráj et al. v. Rámji Joitá.* O.C.J. 169

#### ATTACHMENT OF PROPERTY OF THIRD PERSON—

A judgment-creditor who attaches property which does not belong to his judgment-debtor commits a trespass, for which he is responsible in damages, even though he may have acted without malice and

mistakenly. *Dámodhar Tuljárám v. Lallu Khusáldás* .....A.C.J. 177

ATTACHMENT ON FUNDS OF DEBTOR, EXPECTED TO REACH HANDS OF A THIRD PERSON, INVALID. — See ATTACHMENT OF DEBT.

ATTEMPT TO MURDER.—See EVIDENCE.

AWARD—

1. An application to the High Court to set aside an order of a District Court, reversing an order of a court of first instance directing an award made without the intervention of a court to be filed, should be treated as an application for a miscellaneous special appeal. Such an application may be made on a stamp, of the value of two rupees, under Sch. II., No. 11, of the Court Fees' Act (VII. of 1870).

An appeal lies from an order directing an award made without the intervention of a Court of Justice to be filed in court. *Lakshman Shiváji v. Rámlí Esu et al.* A.C.J. 17

2. The separately recorded opinions, on different dates, of arbitrators (appointed, under Act VI. of 1857, to assess the value of land taken for a public purpose) who have never met or consulted together, do not constitute an award under the Act. An award to be good must contain the *joint* judgment of the arbitrators up to the latest period previous to the execution of the award.

Where a suit for the recovery of land taken, or compensation for being deprived of it, was filed *after* the expiration of three months from the date of an award, and the

Court held the award to be null, the Court, following the procedure laid down in Sec. 31 of Act VI. of 1857, referred the parties to a fresh arbitration. *Fátmá Bibí v. the Collector of Súrat.* A.C.J. 79

BALANCE-ORDER. — See FOREIGN JUDGMENT.

BONA FIDES.—See PURCHASER OF LAND FOR VALUE.

BOUNDARY DISPUTE—

“Boundary dispute,” as used in the Survey Act (Bombay Act I. of 1865), means a contention between two neighbouring land-proprietors as to where a boundary line or boundary marks has or have been fixed by the Survey officers. After the functions of the latter officers have ceased in a district, the Collector, acting under Act III. of 1846, is the proper officer to determine such a dispute, and fix the proper position of the boundary marks.

But where a landholder claims to recover from a neighbouring holder land alleged to have been usurped or encroached upon by the latter, the person aggrieved must file his plaint in court (which, in the case of a claim for mere possession, may be the Court of the Mámlatdár or the ordinary Civil Court), where the determination of the Collector as to the proper position of the boundary line or marks (although it of itself confers or withdraws no right of possession) affords valuable evidence in adjudicating upon the rights of the parties. *Pitámbur Dhári v. Sambhójíráv.* A.C.J. 16

**BREAKING OPEN DOORS.**—*See* ATTACHMENT AGAINST PERSON OR GOODS.

**BRITISH INDIA, TERRITORIAL LIMITS OF.**—*See* HIGH SEAS WITH. IN THREE MILES FROM SHORE.

**BUILDING ERECTED UPON LAND BY PURCHASER.**—*See* PURCHASER BONA FIDE WITHOUT NOTICE.

**BURDEN OF PROOF—**

The plaintiff sued on a bond made in his favour by the defendants, which he alleged had been stolen by the defendants. The defendants, while admitting the execution of the bond, pleaded payment and that the bond had been returned by the plaintiff to them. They did not produce the bond, nor did they offer any evidence of the alleged payment.

Held that, as the defendants admitted the bond and pleaded payment, the burden of proof of such payment lay on them. *Sávjí bin Satu v. Pátlu and Mahádu bin Dháru*.....A.C.J. 139

*See* CIVIL PROCEDURE CODE, SEC. 7.

**BYE-LAW.**—*See* ACTS, CONSTRUCTION OF. MUNICIPAL RULES, 2.

**CALLS.**—*See* INDIAN SUCCESSION ACT, SEC. 282.

**CALLS, LIABILITY OF INSOLVENT TO PAY.**—*See* PERSONAL DISCHARGE.

**CALL-ORDER.**—*See* FOREIGN JUDGMENT.

**CARRYING ON OF BUSINESS.**—*See* LETTERS PATENT OF HIGH COURT OF BOMBAY, AMENDED (1865), CL. 12.

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**CARRYING ON BUSINESS FOR AND IN THE NAME OF PRINCIPAL.**—*See* SERVICE OF SUMMONS.

**CAUSE OF ACTION—**

A suit by one of the Máhárs of a village against his fellow-Máhárs to establish his right to share in the Máhárs' perquisites, such as the carcasses of dead animals, &c., will lie, though such a claim be not tenable against the ryots who may have owned such animals when alive. *Yellápá valad Bhímápá et al. v. Mánkiá*.....A.C.J. 27

*See* LETTERS PATENT OF HIGH COURT OF BOMBAY, AMENDED (1865), CL. 12.

**CAUSE OF ACTION HEARD AND DETERMINED—**

The plaintiff sued to recover certain land, on the ground that he had been forcibly dispossessed of it by the defendant. As the plaintiff did not prove the alleged dispossession, his claim was rejected, but the Court suggested that he might recover in a fresh suit, treating the defendant as a trustee, and offering to make certain payments to him. The plaintiff then filed a fresh suit, framing it in the manner indicated by the Court.

*Held.* That the latter suit, being based on a different cause of action from the former, was not barred, and that the question at issue between the parties was not *res judicata*. *Bhisto Shankar Pátíl v. Rámchandrúráv Raghunáth Juhá-girdár*.....A.C.J. 89

**CAUSING EVIDENCE OF CRIME TO DISAPPEAR—**

*Semble.* A person cannot be convicted, under Sec. 201 of the Penal

Code, of causing evidence of the commission of an offence by himself to disappear, nor can he be convicted of the abetment of such an act (per *Lloyd & Kemball, JJ.*).  
*Reg. v. Kashinath Dinkar et al.*

CR. CA. 126

CERTIFICATE—See ALIENATION BY NATURAL GUARDIAN.

CERTIFICATE OF HEIRSHIP.—

See LEGAL REPRESENTATIVE OF HINDU', 2.

CERTIORARI.—See REMOVAL OF CAUSE FROM SMALL CAUSE COURT.

CHAMPERTY.—See MAINTENANCE, 1.

CHARGE.—See ALTERNATIVE CHARGE.

CHARTER OF THE SUPREME COURT—

SEC. 29 .....O.C.J. 241

SEC. 41.—See SEQUESTRATION, WRIT OF.....O.C.J. 240, 241

SEC. 44. ....CR. CA. 93, 94

CHIRDA' HAKS.—See PRESCRIPTION, 2.

CIVIL PROCEDURE CODE.

O.C.J. 137, 176

SEC. 1.....A.C.J. 95, 186

SEC. 2.—See CAUSE OF ACTION HEARD AND DETERMINED.

SEC. 7—

In applying the provisions of Sec. 7 of the Code of Civil Procedure, the first thing to be considered is whether the cause of action in the second suit is the same as the cause of action in the first. If the cause of action be the same, the second suit is barred in respect of any portion of the claim omitted from the first suit; but not otherwise. Accordingly, where the plaintiff, as a member of an undivided Hindú

family, sued for a share of a particular portion of the family property, leaving the rest undivided, and his suit was rejected, as it had not been brought for his whole share, it was held that this suit was no bar to a second suit to have the whole property divided, as the causes of action in the two suits were entirely distinct.

In a suit for partition of hereditary property, it is not necessary for the plaintiff to trace back his genealogy to the original grantee, and to prove that no other descendant of that grantee except himself and the defendants are in existence. It is sufficient for him to show that he and they are the only representatives of the person who last held the property. If others claim a share, it is for them to show that they have any rights which operate to restrict the plaintiff's *prima facie* right to treat such property as the exclusive property of himself and the defendants.

There is no objection to the award of mesne profits or interest during the whole period for which a suit is pending, however long that period may be. *Kakaji bin Ranaji et al. v. Bipuji bin Madhavrao.*  
A.C.J. 205

See CAUSE OF ACTION HEARD AND DETERMINED. OMISSION OF MORTGAGED LANDS FROM CLAIM.

SEC. 15.—See DECLARATORY DECREE.

SEC. 17, CL. 2.—See SERVICE OF SUMMONS.

SEC. 26. ....O.C.J. 89, 109

SEC. 35. ....O.C.J. 98, 101

SEC. 73.—*See* PRACTICE.

SEC. 81.—*See* ATTACHMENT BEFORE JUDGMENT.

SEC. 83. ....O.C.J. 30, 33, 35, 36

SEC. 85. ....O.C.J. 33, 36

SEC. 97. ....A.C.J. 231

SEC. 104.—*See* LEGAL REPRESENTATIVE OF HINDU', 1.

SEC. 119.—*See* EX PARTE JUDGMENT.

SEC. 187. ....A.C.J. 101

SEC. 200. ....O.C.J. 35

SEC. 201. ....O.C.J. 35

SEC. 203.—*See* LEGAL REPRESENTATIVE OF HINDU', 1. O.C.J. 35.

SEC. 205. O.C.J. 35, 36, 157; A.C.J. 151

SEC. 210.—*See* LEGAL REPRESENTATIVE OF HINDU', 1. O.C.J. 154, 157

SEC. 223. ....A.C.J. 59, 60

SEC. 230. ....A.C.J. 56, 60

SEC. 232 TO 239. ....O.C.J. 37

SEC. 246. — *See* LIMITATION, 1. PURCHASER OF LAND FOR VALUE. A.C.J. 114, 116, 179, 226.

SEC. 247. ....A.C.J. 226

SECS. 249 AND 259.—*See* LEGAL REPRESENTATIVE OF HINDU', 1.

SECS. 284 TO 295. ....A.C.J. 34, 36

SECS. 285 AND 286. ....O.C.J. 34

SECS. 287, 288, AND 296. O.C.J. 35

SEC. 327.—*See* AWARD, 1.

SEC. 348. ....A.C.J. 136

SEC. 350. ....A.C.J. 230

SEC. 376. ....A.C.J. 219

SECS. 377 AND 378 ....A.C.J. 49

SEC. 387.—*See* CAUSE OF ACTION HEARD AND DETERMINED.

CHAP. IV. ....O.C.J. 35

CLAIM FOR ACCOUNT BY REPRESENTATIVE OF DECEASED PARTNER AGAINST THE SURVIVING PARTNERS.—*See* LIMITATION, 2.

COLLECTOR'S ORDER FOR SALE.—*See* SALE OF LAND BY NON-JUDICIAL ORDER OF COLECTE.

COMMISSION UPON SALES—

By an agreement, made on the 10th of January 1857, between K. N. and several other persons, it was agreed that they should form a copartnership for the purpose of erecting a mill for the manufacture of yarn. The capital of the partnership was fixed at Rs. 3,00,000, divided into 100 shares of Rs. 3,000 each.

By the 4th clause of the agreement it was provided that, in return for the trouble K. N. had been at in establishing the factory, "whatever cotton had to be purchased for the factory, K. N. was to purchase, and whatever yarn should be made in the factory, K. N. was to sell, and for whatever he should sell on account of the factory he was duly to receive from the copartnership his commission at the rate of 5 per cent. *during his lifetime*;" and it was also provided that though the purchases and sales by the copartnership should not be made through K. N., "yet upon the whole amount of the sales the copartnership was duly to pay 5 per cent. to K. N. *during his lifetime*."

The factory was built, and its machinery procured and set up, by K. N.,



and both financially and otherwise the factory was wholly managed by him. Shortly after it commenced to work, it was found that the copartnership had expended all its capital and was heavily involved in debt—incurred by K. N. without the sanction of his copartners—and that the factory was working at a loss; and at the suit of some of them, but against the consent of K. N. and a minority of the copartners, the copartnership was ordered to be dissolved. K. N. then claimed to be entitled to compensation for the loss of the commission he should have earned upon the sale of the yarn of the factory during his lifetime.

*Held.* That he was not so entitled; that as between his copartners and K. N. there was no obligation on the former to subscribe more capital after the original capital of the copartnership had been exhausted, and that there was no implied covenant on the part of the copartnership to continue to work the factory in order that K. N. should be in a position to earn his commission during his lifetime.

Distinction between right to compensation for loss of fixed wages, and right to compensation for loss of commission, pointed out.

Imputations of fraud should be disposed of at the hearing, and should not be left open to be proved before the Master on the taking of accounts.

When a partnership is wound up by the Court, all questions arising between the partners out of the partnership transactions should be dis-

posed of in the winding-up suit. *Lalbhái Vallabhbhai et al. v. Kavasji Nánabhái et al.*.....O.C.J. 209

COMPENSATION.—See PURCHASER BONA FIDE WITHOUT NOTICE.

COMPENSATION FOR LOSS OF COMMISSION.—See COMMISSION UPON SALES.

COMPENSATION TO FAMILY OF DECEASED—

Measure of damages to be given (under Act XIII. of 1855) to the family of a person whose death has been wrongfully caused, considered.

English cases bearing upon the subject discussed and applied. *Ratanbái v. The Great Indian Peninsula Railway Company*.....O.C.J. 130

COMPLAINT.—See STAMP.

COMPLAINT, PROCEEDINGS ON.—See VAKIL'S RIGHT TO APPEAR FOR COMPLAINANT.

COMPLAINT UPON OATH—

In cases in which the police cannot arrest without a warrant, a warrant cannot be legally issued by a Magistrate except on a complaint made upon oath (or under the provisions of Sec. 68), whether the Magistrate issuing the warrant is authorised to entertain cases, either on complaint preferred directly to himself, or on the report of a police officer, under Sec. 66 of the Criminal Procedure Code, or not.

The report of a police officer referred to in the above section means, not any communication made by a police officer, but the formal report drawn up under Sec. 155 of the Criminal Procedure Code, in cases

in which the police may arrest without warrant. *Reg. v. Jifar Ali*.

CR. CA. 113

COMPUTATION OF PERIOD OF LIMITATION.—*See* LIMITATION, 3.

### CONDITIONAL PARDON—

A conditional pardon was tendered to and accepted by the accused. He then, on solemn affirmation, made a statement before the committing Magistrate in which he criminated himself and two other persons. Three days afterwards he voluntarily came forward and made on solemn affirmation another statement, in which he retracted and contradicted what he had said in his former statement. The conditional pardon was thereupon cancelled, and the accused was put upon his trial.

*Held* that the first statement was admissible as evidence against the accused, under Sec. 32 of Act II. of 1855. *Reg. v. Alibhai Mithai*.

CR. CA. 103

### CONFESSION—

Although the averment on the record of a Magistrate by whom a prisoner is tried, that the accused, before making a confession, was warned that it was optional with him to answer the questions put to him or not, is on appeal conclusive as to the fact of such a warning having been given, it is not conclusive to show that such a confession has not been made under the influence of fear engendered by previous maltreatment, or is not otherwise valueless.

Allegations, made in a regular and proper manner before a Sessions

Court on appeal, that a confession made by the accused before the Magistrate who tried the case was made under such circumstances as to preclude its admissibility in, or diminish its value as evidence, should receive due attention and be inquired into. A Sessions Court refusing to make such inquiry commits a grave error in law and procedure.

Upon an inquiry which the High Court directed the Session Judge to make into such an allegation, the prisoners were ordered to be, and were, solemnly affirmed, and the prosecution neither objected to the form of the order nor to the affirmation of the prisoners, and moreover cross-examined them, but objected to their evidence being used upon the return of the inquiry. It was held that the objection, though possibly good if taken in time, was too late, and that the evidence of the prisoners might be used, whether the order directing them to be affirmed was correct or otherwise.

Where *during* such an inquiry the Sessions Judge accorded his sanction to the prosecution for perjury of some of the witnesses who deposed on behalf of the prisoners, the High Court considered such a proceeding improper, and eminently calculated to defeat the object of the inquiry. *Reg. v. Kashinath Dinkar et al.* .....CR. CA. 126

*See* CONDITIONAL PARDON.

CONSENT OF KINSMEN OF HUSBAND.—*See* ADOPTION BY WIDOW, 2.



**CONSIDERATION, FAILURE OF.**

—See **MONEY PAID UNDER A MISTAKE INDUCED BY FRAUD.**

**CONSTRUCTIVE INHABITANCY.**

—See **SEQUESTRATION, WRIT OF.**

**CONTINUED VOLUNTARY PAYMENTS.—See PRESCRIPTION, 2.****CONTINUING TRESPASS. — See INJUNCTION.****CONTRACT—**

Where a principal instructed his agent to enter into a contract for the delivery of cotton at the end of Kártik, but the agent entered into a contract for the delivery thereof by the middle of that month :

It was *held* that the agent exceeded his authority in such a manner as to exempt the principal from liability upon the contract.

Though the objection assigned by a principal for repudiating a contract at the time of such repudiation be unfounded, he is not precluded from subsequently availing himself of other valid objections.

A custom which allows a broker to deviate from his instructions is unreasonable, and the courts of law will not enforce it. *Arlápa Náyak v. Narsi Keshavji and Co.* A.C.J. 19

**COPPER.—See ACTS, CONSTRUCTION OF.****COSTS—**

1. Unless the order of a lower court in awarding costs be contrary to law, no special appeal will lie against such order.

*Amár Sáheb v. Jamsedji* (4 Bom. H. C. Rep., A. C. J. 41) followed.

*Semble.* A regular appeal in respect of costs will not lie where there has been *boná fide* care and discretion exercised on the part of the court below. *Desáji Lakhmáji v. Bhavándás Narotamdas.* A.C.J. 100

2. As a general rule, an appeal in respect of costs will only be entertained in cases in which no discretion has been fairly exercised upon the question, and the decision of the Court below has proceeded upon mistake or misapprehension.

Where *boná fide* care and discretion have been exercised, no appeal in respect of costs should be allowed, and the question whether such discretion has been well or ill exercised should not be entertained. *Keshavráv Krishna Joshi v. Bhavánji bin Bábáji*..... A.C.J. 142

See **CIVIL PROCEDURE CODE, SEC. 7.**

**COSTS INCURRED IN A POSSESSORY SUIT.—See MA'MLATDA'S COURT.****COUNSEL.—See PRIVILEGE OF SPEECH COURT FEES' ACT, SCH. II., No. 11. —See AWARD, 1.****CREDIBLE INFORMATION—**

The report of a Subordinate Magistrate, although it is credible information on which a Magistrate of the District would be justified, under Sec. 280 of the Code of Criminal Procedure, in issuing a summons, is not evidence on which he can properly arrive at a conclusion that the accused is likely to cause a breach of the peace.

Secs. 287 and 288 of the Code require that evidence in such a case shall be recorded, and if none is

forthcoming, security to keep the peace should not be demanded.

*Reg. v. Irápá bin Basappá et al.*

CR. CA. 162

### CRIMINAL INTIMIDATION—

Where the accused went to the complainant, the brother of an adult woman, and told him that he had come from the Sarkár and would get him six months' imprisonment if he (the complainant) did not let his sister go :

*Held* that these words did not constitute either criminal intimidation, within the meaning of Sec. 503 of the Indian Penal Code (there having been no threat of an *injury* in the sense of the Code), or any other offence known to the law.

Where there is anything peculiar in the circumstances of a case, a criminal appellate court should notice it, even when such court confirms the conviction by the court which tried the accused. *Reg. v. Morobá Bháskarji*..... CR. CA. 101

### CRIMINAL PROCEDURE CODE—

SEC. 4 .....CR. CA. 83

SEC. 21 ..... CR. CA. 60, 83, 122

SEC. 22 .....CR. CA. 122

SEC. 23 .....A.C.J. 203

SEC. 26 .....CR. CA. 83

SECS. 65 AND 66 ..... A.C.J. 203

SECS. 66 A, 68, AND 155.—*See* COMPLAINT UPON OATH.

SECS. 166 TO 168 .....CR. CA. 26, 30

SEC. 167.—*See* SANCTION FOR PROSECUTION BY LOCAL GOVERNMENT.

SEC. 169.—*See* SANCTION FOR PROSECUTION .....CR. CA. 29, 30

SEC. 170.—*See* SANCTION TO PROSECUTE.....CR. CA. 25, 26

SEC. 171. ....CR. CA. 30

SEC. 180.—*See* VAKI'L'S RIGHT TO APPEAR FOR COMPLAINANT.

SEC. 203 ..... CR. CA. 105, 106, 108

SEC. 204 .....CR. CA. 151

SECS. 209 AND 211.—*See* CONDITIONAL PARDON.

SEC. 242.—*See* ALTERNATIVE CHARGE.

SEC. 244 ..... CR. CA. 29, 314

SEC. 248 .. .....CR. CA. 113

SEC. 259.....A.C.J. 203

SECS. 280, 287, AND 288.—*See* CREDIBLE INFORMATION.

SECS. 308 AND 311.—*See* ORDER BY MAGISTRATE FOR REMOVAL OF BUILDING, &c. FROM PUBLIC PLACE.

SEC. 316.—*See* MAINTENANCE-ORDER.

SEC. 317 .....CR. CA. 124

SEC. 359 .....CR. CA. 123

SEC. 373 .....CR. CA. 151

SEC. 404 .....CR. CA. 21, 33

SEC. 426 .....CR. CA. 141, 158

SEC. 429 .....CR. CA. 102

SEC. 432 .....A.C.J. 203

SEC. 433 .....CR. CA. 9

SEC. 434 .....CR. CA. 12, 124, 125

CROWN PROSECUTOR. — *See* PUBLIC PROSECUTOR.

CUSTOM.—*See* CONTRACT.

DEATH CAUSED BY NEGLIGENCE. — *See* COMPENSATION TO FAMILY OF DECEASED.

DEBTOR'S LIABILITY TO SECOND PAYMENT.—*See* LEGAL REPRESENTATIVE OF HINDU', 2.

### DECLARATORY DECREE—

A suit to be declared *vadál*, or elder, among the holders of a *pátálki watan* will not lie, as upon such

ESTOPPEL.—*See* LANDLORD AND TENANT.

EUROPEAN BRITISH SUBJECT.  
—*See* NATIVE STATES, OFFENCE IN.

EVIDENCE—

A young Bráhmaṇ widow was confined of a child. The chief constable of police, acting, as he stated, on information that the accused was about to kill a baby, went to search her house with a number of men, and found her lying on the first floor, and discovered on the second floor a living new-born child wrapped up in a cloth with a cooking-pot turned over it.

The Session Judge convicted the accused of attempt to murder.

The High Court on appeal reversed the conviction, on the ground that the evidence was insufficient to support it.

It was also held in this case that the chief constable's statement, that he "had information that the accused was about to kill the baby," was most improperly admitted as evidence against the accused.

Action of the police censured.

When a person abets the commission of an offence and is present at the time when it is committed, he should be tried, under Sec. 114 of the Indian Penal Code, for the same offence as the principal. *Reg. v. Chimá*.....CR. CA. 164

*See* ADMISSION MADE IN A DEPOSITION.  
CONDITIONAL PARDON. CONFESSION.  
CREDIBLE INFORMATION. FALSE EVIDENCE. READINESS AND WILLINGNESS OF VENDOR TO DELIVER.

EXCLUSIVE COLLECTION BY ONE KABULA'YATDA'R.—*See* PRESCRIPTION, 3.

EXECUTION—

An application for the execution of a decree, though made within three years from the date of a previous application, is barred under Sec. 20 of Act XIV. of 1859, if the previous application were barred, even though execution was allowed to issue on such application. *Gopál Govind v. Ganesh Tejmal*.....A.C.J. 97

*See* ATTACHMENT AGAINST PERSON OR GOODS.

EXECUTION AGAINST HUSBAND—

Ornaments on the person of a Hindú wife, if forming part of her *stridhan*, cannot be taken under an execution against her husband. On certain occasions, however, the husband may take them, but the right is personal to him. *Tukáram bin Rámkrishṇa v. Gunáji bin Mháloji*.  
A.C.J. 129

EX PARTE JUDGMENT—

A Judge has no jurisdiction to grant an application, made by a defendant against whom an *ex parte* judgment has been passed, to set aside the judgment after the expiration of the thirty days allowed, by Sec. 119 of the Code of Civil Procedure, for making such applications.

Such an application must be made within thirty days after the first process for enforcing the judgment against such defendant has been executed.

and that six years' arrears of such deductions could be recovered under Sec. 1., cl. 16, of Act XIV. of 1859. *Rangobú Náik bin Rúghobá v. The Collector of Ratnágiri.* A.C.J. 107

DISCRETION. — See COSTS, 1, 2.  
INDIAN DIVORCE ACT, SEC. 14.

DISOBEDIENCE OF ORDER ISSUED BY MAHA'LKARI—

A Mahálkari invested with the powers of a 2nd Class Subordinate Magistrate cannot issue a summons under Sec. 8 of Act XI. of 1843, nor can a person be convicted under Sec. 174 of the Indian Penal Code for having disobeyed such a summons so issued. *Reg. v. Venkúji Bháskar* .....CR. CA. 19

DISSOLUTION OF MARRIAGE.—

See INDIAN DIVORCE ACT, SEC. 14.

DISTRIBUTION OF ASSETS.—See  
INDIAN SUCCESSION ACT, SEC. 282.

DIVORCE OF WIFE BY HUSBAND.—See MAINTENANCE BY MUHAMMADAN HUSBAND.

DOOR, LIGHT ADMITTED BY.—  
See MANDATORY INJUNCTION.

EASEMENT. — See MANDATORY INJUNCTION. PRESCRIPTION, 1.

ENGLISH COMPANIES' ACT, 1862. — See FOREIGN JUDGMENT.

O.C.J. 21, 22, 25, 26, 27

SEC. 75.....O.C.J. 126, 127, 128

SEC. 76. ....O.C.J. 127

SEC. 77. O.C.J. 124, 126, 127, 128, 129

EQUITABLE ASSIGNMENT PRIOR TO ATTACHMENT.—See  
ATTACHMENT OF DEBT.

EQUITY OF REDEMPTION—

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R. mortgaged certain land to A. in 1844, stipulating that if he (R.) failed to pay a moiety of the mortgage-money within three years, or wholly redeem within five years, from the date of the mortgage, the property mortgaged should be considered as sold to A. The property remained in the possession of R. till 1847, at the end of which he gave it into the possession of A, R. then believing that he had thereby lost all right to the property. Subsequently to 1847 the property changed hands. The absolute right was first sold in 1855, and then on two occasions in 1862. At this time R. did not raise any objection to the property being sold, although he was fully aware of the fact.

R. had also admitted, in a suit brought against him in 1850 by A., that he had sold the land to A.

In a suit brought by R. against A. in 1867, to redeem the mortgaged property :

*Held* (following the decision in S. A. No. 299 of 1864) that R. was entitled to redeem the property.

*Held also* that, under the peculiar circumstances of this case, the court would not be justified in calling upon the mortgagees to furnish accounts of the rents and profits on the one hand, and of the principal and interest on the other.

Interest on the value of improvements made since the time the property came into the hands of A. disallowed. *Rámshet Bachúshet v. Pandharináth.* .....A.C.J. 236

ESTOPPEL.—See LANDLORD AND TENANT.

EUROPEAN BRITISH SUBJECT.—See NATIVE STATES, OFFENCE IN.

EVIDENCE—

A young Bráhmaṇ widow was confined of a child. The chief constable of police, acting, as he stated, on information that the accused was about to kill a baby, went to search her house with a number of men, and found her lying on the first floor, and discovered on the second floor a living new-born child wrapped up in a cloth with a cooking-pot turned over it.

The Session Judge convicted the accused of attempt to murder.

The High Court on appeal reversed the conviction, on the ground that the evidence was insufficient to support it.

It was also held in this case that the chief constable's statement, that he "had information that the accused was about to kill the baby," was most improperly admitted as evidence against the accused.

Action of the police censured.

When a person abets the commission of an offence and is present at the time when it is committed, he should be tried, under Sec. 114 of the Indian Penal Code, for the same offence as the principal. *Reg. v. Chimá*.....CR. CA. 164

See ADMISSION MADE IN A DEPOSITION. CONDITIONAL PARDON. CONFESSION. CREDIBLE INFORMATION. FALSE EVIDENCE. READINESS AND WILLINGNESS OF VENDOR TO DELIVER.

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Such an application must be made within thirty days after the first process for enforcing the judgment against such defendant has been executed.

Though an order passed for setting aside a judgment is, on the merits of the application, final, yet where a Civil Court makes an order setting aside an *ex parte* judgment on an application presented after the period allowed by law has elapsed, an appeal against that order will lie on the ground that it has been made without jurisdiction. *Keshav-rām valad Hirāchand et al. v. Rām-chandra Trimbak et al.* A.C.J. 44

### EXTRADITION—

Sec. 23 of Act VII. of 1854 is not repealed by the Schedule to Act XVII. of 1862.

The treaty of the 6th of November 1817 between H. H. the Gáikvād of Barodá and the East India Company provides for the delivery upon requisition of accused persons to H. H. the Gáikvād *in a manner other than* in accordance with the provisions of the sections of Act VII. of 1854 prior to the 23rd section. The latter section is, therefore, applicable in such a case.

*Semble* that Government would not be justified in delivering up an accused person to H. H. the Gáikvād without holding a preliminary inquiry into the guilt of such accused.

Where a warrant issued under Sec. 23 of Act VII. of 1854 directed the accused person to be delivered up to the Resident at Barodá, without showing either that an inquiry had been made, or was about to be made, the Court held that it was not therefore invalid, as the presumption was that the accused was to be delivered up to the Resi-

dent in order that that officer might institute such an inquiry as is required by the Act.

A warrant issued under Sec. 23 of the Act should recite either that an inquiry has been held, or is about to be held, with reference to the guilt of the accused. *Reg. v. Souter.* .....CR. CA. 13

### FALSE EVIDENCE—

The accused was convicted of intentionally giving false evidence in a judicial proceeding, in having, as a witness therein, made, on solemn affirmation, a false statement. The proceedings in the trial at which the alleged false evidence was given were subsequently annulled, in consequence of the sanction for the prosecution being insufficient.

*Held* that the conviction of the accused must be reversed, as the false statement was not made in a stage of a judicial proceeding.

The proceedings in a criminal trial, when necessary to be proved, should be proved by their production. *Reg. v. Rájji valad Tíju.* CR. CA. 37

### FALSE STATEMENT—

When an offence under Sec. 193 of the Indian Penal Code is established, a conviction under Sec. 181 is illegal.

When the accused made on solemn affirmation a statement before an Income Tax Commissioner which statement the accused knew, or had reason to believe, to be incorrect:

*It was held* that such statement amounted to the offence of giving false evidence in a judicial proceed-



ing, under Sec. 193 of the Indian Penal Code, and was, therefore, not cognisable by a Full Power Magistrate, as it could not be treated as constituting an offence triable under Sec. 181 of the Indian Penal Code (making a false statement to a public servant). *Reg. v. Dayálji Endarji*.....CR. CA. 21

#### FEMALE'S RIGHT TO INHERIT.—

See MAJMUDA'RI WATAN.

FILING OF AWARD MADE WITHOUT INTERVENTION OF COURT.—See AWARD, 1.

#### FINAL DISCHARGE—

An opposing creditor who has not filed grounds of opposition to, or opposed, the personal discharge (under Sec. 47 of the Indian Insolvent Debtors' Act) of an insolvent trader, can nevertheless come in and oppose the insolvent trader's application for his final discharge under Sec. 60 of the Act.

The grounds of such opposition may include matters which might have been put forward as grounds for opposing the insolvent trader's personal discharge under Sec. 47 of the Act, and need not necessarily be confined to matters either not known at, or that have occurred since, the time of the personal discharge being granted.

The Court, in considering whether it will grant or refuse to an insolvent trader his final discharge, will take into consideration the whole course of the mercantile dealings of the insolvent trader, and will not confine itself to his conduct with reference to the opposing creditor merely. *In re Pestanji*

*Shápurji Káká and Edalji Shápurji Káká*.....O.C.J. 37

FINALITY.—See FOREIGN JUDGMENT.

FISHING - STAKES, REMOVAL OF.—See HIGH SEAS WITHIN THREE MILES FROM SHORE.

FORECLOSURE.—See EQUITY OF REDEMPTION.

#### FOREIGN JUDGMENT—

The Courts in India treat a call-order made by the Court of Chancery in England upon a contributory of a company registered in England, and being wound up under the authority of the Court of Chancery, as a foreign judgment, and will not allow the liability of a defendant sued upon such order to be disputed, unless it be shown that the Court had no jurisdiction to make the order, or that the defendant had no notice of it, or that it is not in its nature a final order. *The London, Bombay, and Mediterranean Bank, Limited, v. Hormasji Pestanji Frámji*. O.C.J. 200

FORFEITURE.—See MA'L LAND.

"FORTHWITH."—See SEQUESTRATION.

FOUND GAMING.—See GAMING.

FRAUD.—See COMMISSION UPON SALES. MONEY PAID UNDER A MISTAKE INDUCED BY FRAUD.

GA'IKVA'D OF BARODA'S TREATY.—See EXTRADITION.

#### GAMING—

A warrant issued under Sec. 58 of Act XIII. of 1856 should be addressed to some one or more Inspectors, and not generally to "all Constables and Peace Officers." Where a warrant in the latter form

was executed under the direction of an Inspector, it was held that the error in the form of the warrant was merely an error of procedure, and did not affect the validity of the conviction, under Sec. 57, of persons apprehended in pursuance of the warrant so executed.

A person is "found gaming," within the meaning of Sec. 57 of Act XIII. of 1856, who, having been *seen* gaming by an Inspector of Police, is shortly afterwards, in a place adjoining the room in which he was seen gaming, apprehended by Police Constables acting under the direction of such Inspector.

*Reg. v. Nánú Moreji et al.* CB. CA. 1

GIVING IN ADOPTION VICARIOUSLY.—*See* STRI'DHAN.

GOOD FAITH.—*See* DEFAMATION.

GRANT BY GOVERNMENT—

Government cannot, by issuing a subsequent proclamation, resume a grant made by a previous proclamation, inasmuch as it cannot, any more than a private person, without the consent of the donee, revoke a gift actually made. *The Collector of Ratnágiri v. Vyankat-ráv Núrbyan Surve* .....A.C.J. 1

GROUND OF OPPOSITION.—*See* FINAL DISCHARGE.

GUARDIAN OF A WIDOWED DAUGHTER-IN-LAW.—*See* ALIENATION BY NATURAL GUARDIAN.

GUJARA'T, CUSTOM OF.—*See* INVASION OF PRIVACY.

HEARING OF SUIT.—*See* PRACTICE.

HIGH COURT RULES. O.C.J. 137,

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## HIGH SEAS WITHIN THREE MILES FROM SHORE—

An offence committed on the high seas but within three miles from the coast of British India, as being committed within the territorial limits of British India, is punishable under the provisions of the Indian Penal Code.

The ordinary Criminal Courts of the country have jurisdiction over such offences by virtue of the Stat. 12 & 13 Vict., c. 96, ss. 2 and 3, extended to India by Stat. 23 & 24 Vict., c. 88.

*Semble.* The Governor General of India in Council has no power to legislate for offences committed on the high seas outside the territorial limits of British India, though he has power to legislate in respect of offences committed on the high seas within three miles of its coasts.

Meaning and effect of Stat. 12 & 13 Vict., c. 96, ss. 2 and 3, considered.

*The Queen v. Thompson* (1 Beng. L. Rep., O. Cr. J. 1) commented on.

Where certain of the inhabitants of the village of Manori, in the Tháná District, sailed out in boats and pulled up and removed a number of fishing-stakes lawfully fixed in the sea within three miles from the shore by the villagers of a neighbouring village; *it was held* (I.) that a Magistrate F. P. in the Tháná District had jurisdiction over the offenders; (II.) that the Indian Penal Code was the substantive law applicable to the case; and (III.) that the offence amounted to mischief within the meaning



of Secs. 425 and 427 of that Code. *Reg. v. Kastyá Rámá et al.*  
CR. CA. 63

**HINDU' LAW.**—*See* ADOPTION. ADOPTION BY WIDOW, 1, 2. EXECUTION AGAINST HUSBAND. JURISDICTION. LEGAL REPRESENTATIVE OF HINDU', 1. MAINTENANCE, 2. MORTGAGE. STRÍ-DHAN.

**HINDU' WIDOW.**—*See* MAINTENANCE, 2.

**HINDU' WIFE.** — *See* THEFT OF PALLA'.

**IMPLIED COVENANT.**—*See* COMMISSION UPON SALES.

**IMPROPER ADMISSION OF POLICE EVIDENCE.**—*See* EVIDENCE.

**IMPROVEMENTS.**—*See* EQUITY OF REDEMPTION.

**INCOME TAX COMMISSIONER.**—*See* FALSE STATEMENT.

**INDIAN COMPANIES' ACT.**—*See* PERSONAL DISCHARGE.

**INDIAN DIVORCE ACT, SEC. 14—**

The Courts in India will adopt, as a guide, in the exercise of the judicial discretion in granting or refusing a decree of dissolution of marriage given by Sec. 14 of the Indian Divorce Act, the principles laid down in the English decisions with regard to the corresponding section in the English Act (20 & 21 Vict., c. 85, s. 31).

The discretion to be exercised under Sec. 14 of the Indian Divorce Act must be a regulated discretion. The Court cannot grant or withhold a divorce on the mere footing that the petitioner's adultery is more or less pardonable, or that it

has been more or less frequent. There must be special circumstances attending the commission of such adultery, or special features placing it in some category capable of distinct statement and recognition, in order that the discretion may be fitly exercised in favour of a petitioner. *John G. v. Mary Anne G.* ..... O.C.J. 48

**INDIAN LIMITATION ACT, 1871.**—*See* PRESCRIPTION, 1.

**INDIAN PENAL CODE—**

SEC. 1 .....CR. CA. 67

SEC. 2 .....CR. CA. 67, 68, 76, 93

SECS. 3 AND 4 .....CR. CA. 93

SEC. 23.....CR. CA. 85, 86

SEC. 24 .....CR. CA. 71

SEC. 87.....CR. CA. 112

SEC. 109. CR. CA. 127, 128, 132, 141,  
148, 158

SEC. 114.—*See* EVIDENCE.

SEC. 161.....CR. CA. 33

SEC. 174.—*See* DISOBEDIENCE OF ORDER ISSUED BY MAHA'LKARI.

SEC. 179 .....CR. CA. 105, 107

SEC. 181.—*See* FALSE STATEMENT.

SEC. 193.—*See* FALSE STATEMENT. SANCTION FOR PROSECUTION. SANCTION TO PROSECUTE.

SEC. 201.—*See* CAUSING EVIDENCE OF CRIME TO DISAPPEAR.

SECS. 202 AND 203 .....CR. CA. 129

SEC. 268..... CR. CA. 9

SEC. 290 .....CR. CA. 9

SEC. 307.....CR. CA. 164

SECS. 342 AND 374 .....CR. CA. 93

SEC. 403 .....CR. CA. 113

SEC. 409.—*See* ALTERNATIVE CHARGE.

SEC. 420 .....CR. CA. 158

SECS. 425 AND 427.—*See* HIGH SEAS WITHIN THREE MILES FROM SHORE.

SECS. 463 AND 471.—*See* SANCTION TO PROSECUTE.

SEC. 499.—*See* DEFAMATION.

SEC. 500 .....CR. CA. 171

SEC. 503.—*See* CRIMINAL INTIMIDATION.

SEC. 506 .....CR. CA. 101

INDIAN SUCCESSION ACT, SEC. 282—

*Semble* that an administrator who pays such debts as he knows of otherwise than *equally and rateably as far as the assets of the deceased will extend*, in accordance with the provisions of Sec. 282 of Act X. of 1865, is personally liable for any loss to a creditor of the deceased occasioned by such improper distribution of the assets.

In order to charge such administrator, his knowledge must be actual, as distinguished from a constructive or imputable knowledge.

A liability to pay calls is a debt within the meaning of the above section (282 of Act X. of 1865). *Asiatic Banking Corporation v. Amador Viegas et al.* ..... O.C.J. 20

INDORSEMENT UPON COPY-ORDER.—*See* SEQUESTRATION.

INJUNCTION—

Principles upon which the Court will interfere by injunction to restrain acts of public functionaries in excess of their statutory powers considered.

If the Municipal Commissioner of Bombay is desirous of putting in force the provisions of Sec. 131 of the Municipal Act (Bombay Act II. of 1865), and compelling a householder (whose house has been

taken down) to set the foundations back to the general level of the street, he must exercise his powers when, or within fourteen days after, the householder gives notice, under Sec. 160 of the Act, of his intention to rebuild.

Where a trespass of a continuing nature has been committed by the defendant; but has been discontinued before suit brought, the Court will not interfere by injunction to restrain the defendant from continuing such trespass merely because the plaintiff entertains vague apprehensions that the trespass may be recommenced. *Ohhabildás Lallubhái v. The Municipal Commissioner of Bombay.* O.C.J. 85

*See* MANDATORY INJUNCTION.

INSOLVENCY. — *See* FINAL DISCHARGE. PERSONAL DISCHARGE.

INTEREST. — *See* CIVIL PROCEDURE CODE, SEC. 7.

INTEREST ON THE VALUE OF IMPROVEMENTS. — *See* EQUITY OF REDEMPTION.

INVASION OF PRIVACY—

Where a window opened by the defendant commanded a view, not of the plaintiff's private apartments, but of an open courtyard outside his house, it was held that there had been no invasion of the plaintiff's privacy which would entitle him to have the window closed, according to the custom legally recognised in Gujarát. *Keshav Harkhá v. Ganpat Hirachand* .....A.C.J. 87

JOINDER OF NEW PARTIES.—*See* PRACTICE.

**JOINT JUDGMENT OF ARBITRATORS.**—*See* AWARD, 2.

**JOINT KABULA'YATDA'RS.**—*See* PRESCRIPTION, 3.

**JUDGMENT-CREDITOR.**—*See* ATTACHMENT OF DEBT.

**JUDICIAL PROCEEDING.** — *See* FALSE EVIDENCE. FALSE STATEMENT.

**JURISDICTION**—

Where an objection to the jurisdiction of the court of first instance was taken for the first time in special appeal, being based on an illegal withdrawal of the suit by the District Judge from the Sadr Amin's to the Assistant Judge's file:

*It was held* that the High Court was not bound to entertain the objection, unless it was patent on the face of the record.

The assignment in a trust-deed by which a person assigns all his property to trustees for the benefit of his creditors protects the assets so assigned from all his creditors.

Where a suit is brought against a Hindú son, personally and as representative of his father, a decree ought to be given against the son, whether he has inherited any property or not, the result of such a decree in the case of non-inheritance being that it cannot be executed against the non-inheriting son. *Bápuji Auditrám et al. v. Umedbhái Hathesing et al.* A.C.J. 245

*See* ALTERNATIVE CHARGE. HIGH SEAS WITHIN THREE MILES FROM SHORE. LETTERS PATENT OF HIGH COURT, CL. 12. MUNICIPAL RULES, 1.

NATIVE STATES, OFFENCE IN. OTHER LAWS, OFFENCES AGAINST. ORDER BY MAGISTRATE FOR REMOVAL OF BUILDING, &c., FROM PUBLIC PLACE. REVIEW. SANCTION FOR PROSECUTION BY LOCAL GOVERNMENT. SANCTION TO PROSECUTE. SARDA'R FOR RANK AND PRECEDENCE ONLY. SEQUESTRATION, WRIT OF. SERVICE LANDS. SMALL CAUSE COURT, 1, 2.

**JUVENILE OFFENDER**—

Under Act VI. of 1864 (the Whipping Act) a juvenile offender means a person under the age of sixteen years. *Reg. v. Muhammad Ali valad Abdul Ali*. C.R.C.A. 9

**KHOJA' MUHAMMADANS.**—*See* MAINTENANCE BY MUHAMMADAN HUSBAND.

**KHOT'S POWER TO BIND HIS CO-SHARERS.**—*See* ABANDONMENT OF RIGHTS BY MANAGING KHOT.

**KNOWLEDGE OF DEBT.**—*See* INDIAN SUCCESSION ACT, SEC. 282.

**LANDLORD AND TENANT**—

If the existence of a tenancy be established by the fact of the tenant's payment of rent to his landlord or otherwise, the tenant cannot ordinarily dispute the title of his landlord in a suit brought against him for recovery of possession. He must first give up possession, and then, if he has any title *aliunde*, that title may be tried in a suit of ejectment against the landlord. *Vásudeo Dáji v. Bábúji Ránu* ..... A.C.J. 175

**LEGAL REPRESENTATIVE OF HINDU**—

1. Where a Hindú died leaving a childless widow and a separated brother:

It was held that, until a legal representative is appointed to the deceased's estate, his widow is the only person who can defend a suit as his representative; and that, while a decree obtained against the widow will enable a creditor to attach and sell not only the widow's life-estate in the immoveable property, but also the reversionary estate of the remainderman, yet a decree obtained against the remainderman will not enable the creditor to touch the estate in the hands of the widow.

When a decree has been obtained against A in his lifetime, and A dies before execution, A's estate is properly described in the proceedings in execution as the estate of A (Sec. 210, Code of Civil Procedure); and in the certificate of sale the purchaser is properly declared to have purchased the right, title, and interest of A in the property sold; but this procedure is improper in cases in which the debtor dies before or pending the suit, and the suit is brought or continued against his representative. In such case the representative, and not the deceased person; is the defendant (Secs. 104 and 203); and in the notification of sale (Sec. 249) and in the certificate of sale (Sec. 259) it ought to be set forth that what is sold is the right, title, and interest of the representative on the record.

A *bonâ fide* purchaser without notice for valuable consideration at an auction-sale is, as a general rule, entitled to protection, notwithstanding any irregularity or defect

in the proceedings or decree in the suit. But when the decree is against the representative of a deceased person, the purchaser is bound to satisfy himself that the party sued as the representative of the deceased is his legal representative.

The legal representative of a deceased person, though not a party to the suit, will be bound by the execution-sale, if he either knowingly allowed the suit to be defended by another person claiming to be the legal representative, or if, knowing of the sale, he stood by and allowed the purchaser to pay, in the belief that he acquired a good title.

*Edalji Hormasji et al. v. Máhabu Begam*, Special Appeal No. 266 of 1869, considered. *Núthá Hari v. Jamni*. .....A.C.J. 37

2. A defendant who is sued by the holder of a certificate of heirship to a deceased Hindú for a debt due from the defendant to the deceased is at liberty to show, notwithstanding the certificate of heirship, that he has paid the debt he owed the deceased to the actual heir of the latter before the grant of the certificate of heirship. It will not, however, be sufficient for such defendant to show that he has paid his debt to a person whom he *bonâ fide* believed to be such heir. *Purshotam Mansukh v. Ranchhod Purshotam* .....A.C.J. 152

#### LEGISLATION FOR HIGH SEAS.-

See HIGH SEAS WITHIN THREE MILES FROM SHORE.

LETTER WRITTEN TO PROTECT  
RELIGIOUS INTERESTS OF  
WRITER.—*See* DEFAMATIONS.

LETTERS OF ADMINISTRATION  
GRANTED TO ADMINISTRATOR  
GENERAL.—*See* ADMINIS-  
TRATOR OF THE ESTATE OF A DECEASED  
HINDU.

LETTERS PATENT OF HIGH  
COURT OF MADRAS, CL. 12.  
O.C.J. 111, 166

LETTERS PATENT OF HIGH  
COURT OF BOMBAY (1862).  
O.C.J. 11

CL. 12..... O.C.J. 105

CL. 21..... CR. CA. 93

CL. 37..... O.C.J. 100

LETTERS PATENT OF HIGH  
COURT OF BOMBAY, AMENDED  
(1865) ..... O.C.J. 101

CL. 12—

The defendants resided and carried  
on business in London, and em-  
ployed Sir C. F. and Co. as their  
commission agents in Bombay.  
The plaintiffs at Bombay executed  
a power of attorney in favour of  
the defendants to enable them to  
sue in England for certain money  
due to the plaintiffs, and handed  
the power of attorney to Sir C. F.  
and Co., who undertook to forward  
it to the defendants in London,  
and that the defendants should  
endeavour to recover the money so  
due to the plaintiffs. The de-  
fendants recovered the money in  
England for the plaintiffs, but did  
not transmit it to the plaintiffs in  
Bombay.

In a suit brought by the plaintiffs to  
recover the money so received by  
the defendants, *it was held that*

the cause of action had not arisen  
wholly in Bombay, and that the  
High Court, under CL. 12 of its  
Letters Patent, had no jurisdiction  
to entertain the claim, the leave  
of the court to file the suit not  
having been obtained.

Where an English firm, upon the  
usual terms, employs a Bombay  
firm to act as the English firm's  
commission agents in Bombay, such  
English firm does not thereby  
render itself liable to be sued in  
the High Court of Bombay, as it  
does not carry on business within  
the local jurisdiction of such High  
Court within the meaning of the  
above clause of the Letters Patent.  
*Khimji Chaturbhuj et al. v. Sir  
Charles Forbes, Baronet, et al.*

O.C.J. 102

O.C.J. 30, 240

CL. 13.—*See* REMOVAL OF CAUSE FROM  
SMALL CAUSE COURT.

CL. 16 ..... O.C.J. 63

CL. 22 ..... CR. CA. 93

CL. 37 ..... O.C.J. 100

LEX LOCI..... CR. CA. 74

LIGHT AND AIR.—*See* MANDATORY  
INJUNCTION.

LIMITATION—

1. In 1848 a *sén* mortgage was exe-  
cuted to the plaintiffs; in 1850 the  
plaintiffs obtained a personal decree  
against the mortgagor; in 1857 this  
decree was modified in appeal, and  
the claim was allowed against the  
mortgaged property. In 1854 the  
mortgaged property was sold to the  
defendants at a sale held by a Civil  
Court in execution of a decree  
obtained against the mortgagor by  
a third party, and possession was

made over to them. In 1866 the plaintiffs applied for execution of the decree obtained by them in 1857, and attached the mortgaged property in the hands of the defendants. The defendants then came in under Sec. 246 of the Code of Civil Procedure, and the attachment was raised on the 26th of July 1866; and the plaintiffs within one year from that day sued to have their debt satisfied out of the mortgaged property.

Held that the plaintiffs' claim (they not having sued the present defendants within twelve years from the date of the mortgage or of the sale to the defendants) was barred by the law of limitation, Act XIV. of 1859, Sec. 1., cl. 12. *Gokálbhái Mulchand et al. v. Jhaver Chaturbhuj et al.* .....A.C.J. 61

2. A right to an account claimed by the representatives of a deceased partner in a firm against his surviving partners falls under Sec. 4 of Reg. V. of 1827, and is not a debt within the meaning of Sec. 3 of that Regulation. *Bháichand bin Khemchand et al. v. Fulchand Harichand et al.* .....A.C.J. 150

3. The question whether the plaintiff is entitled, in computing the period of limitation, to deduct the time occupied in prosecuting a former suit, depends in the first place upon the question whether the former suit was brought upon the same cause of action as the new suit. Where the plaintiff brought two suits, one against one branch of the family and the other against another branch, to recover a share of that portion of the property

which was in the possession of each, and these suits were rejected on the ground of their having been improperly brought, it was held that in bringing a consolidated suit against all sharers for a general partition the plaintiff was not entitled to deduct the time occupied in prosecuting his former suits. *Joitárám Bechar v. Búi Gangú.* .....A.C.J. 228

See ACCOUNT STATED. DESHMUKH, USUAL SERVICES OF. EXECUTION. PRESCRIPTION, 2. SALE OF LAND BY NON-JUDICIAL ORDER OF COLLECTOR.

LIMITING TIME IN ORDER.—See SEQUESTRATION.

LIS PENDENS.—See MORTGAGE.

LOCAL LEGISLATURE, POWERS OF.—See SERVICE LANDS.

MAGISTRATE'S EXAMINATION.—See PUBLIC PROSECUTOR.

MAHA'LKARI. — See DISOBEDIENCE OF ORDER ISSUED BY MAHA'LKARI.

MA'HA'R'S PERQUISITES.—See CAUSE OF ACTION.

MAINTENANCE—

1. One M. H., being apprehensive that (in consequence of an action of trespass in the Supreme Court which M. R. and A. R. had brought against P. P.) he was in danger of being deprived of a piece of land of which he was then possessed, entered into an agreement with K. N., that he, K. N., should conduct the pending case at his own costs and necessary expenses, and that after M. H. should have proved that the piece of land was his sole property, K. N. and M. H. should erect a building on it at



their joint expense, and that the rents and profits of such building should be enjoyed by K. N. and M. H. jointly during the lifetime of M. H., after whose death the property, with the building, was to be the sole and absolute property of K. N.

*Held* that the above agreement (when considered in connection with its surrounding circumstances) did not savour of maintenance or champerty, nor was it void as being against public policy.

The question as to how far the English law relating to maintenance and champerty is applicable to Hindús in the Presidency towns considered.

*Quære* whether that law was ever applicable to cases where pecuniary assistance is afforded to defendants.

Where K. N., claiming under the above agreement, sued to recover the property comprised in it from the mortgagee of the administrator of M. H., who was in possession of the property, it was held that the representatives of the mortgagor were not necessary parties to the suit. *Dámodhar Mádhavji v. Kahándís Núrándís.* O.C.J. 1

2. Where the nearest relative of a Hindú widow sued for recovery of property in her possession, and the lower appellate court awarded the claim without fixing the amount of maintenance to be given to the widow ;

The High Court remanded the suit in order that the amount of main-

tenance might be fixed, notwithstanding that the widow claimed maintenance in that court for the first time. *Rázúbái v. Sadu bin Bhaváni et al.* .....A.C.J. 98

#### MAINTENANCE BY MUHAMMADAN HUSBAND—

An order made by a Magistrate under Act XLVIII. of 1850 (Police Amendment Act), Sec. 10, directing a Muhammadan husband to pay a sum monthly for the maintenance of his wife, does not deprive such husband of his inherent right to divorce his wife, and after such divorce the Magistrate's order can no longer be enforced.

Custom as to divorce amongst Khojá Muhammadans of the *Sunni* sect considered. *In re Kásam Pirbhái and his wife Hirbái* .....CR. CA. 95

#### MAINTENANCE-ORDER—

It is open to a husband upon whom an order to make an allowance for the maintenance of his wife has been made, under Sec. 316 of the Criminal Procedure Code, after such order has been made, to prove that his wife is living in adultery, and upon such proofs a Magistrate is justified in cancelling an order made under the above section. *Chaku v. Ishvar Bhudar.* CR. CA. 124

#### MAJMUDA'RI WATAN—

Since the passing of Act XI. of 1843 a female can inherit a *majmudári watan*.

The Collector can assign the whole proceeds of a *watan* to the officiating person, who is entitled to retain such proceeds as his remuneration. *Bái Suraj v. The Government of Bombay et al. ; Bápubhái Khushál-*

*dás et al. v. Bái Suraj and the Government of Bombay* ...A.C.J. 83

#### MA'L LAND—

A person who fails at the Survey to take up *mál* land, which he held without assessment before the Survey, and allows it to be taken up by another cultivator who pays the assessment upon it, must be held to have forfeited his claim to such land. *Bálkrishna Govind Gúdgil v. Nárhyan Sakhúrám et al.* .....A.C.J. 180

#### MALTREATMENT PRIOR TO WARNING INDUCING CONFESSION.—See CONFESSION.

#### MA'MLATDA'R'S COURT—

No action lies for the recovery of costs incurred by a defendant in defending himself in a possessory suit brought against him in a Mámlatdár's Court under Bombay Act V. of 1864. *Júlam Punjá v. Khodá Javrú*.....A.C.J. 29

#### MANDATORY INJUNCTION—

Where two houses are held jointly by several owners deriving their title from a common source, and one of such houses enjoys a continuous, as distinguished from an occasional, easement over the other, such easement will, upon a partition of the premises, pass to the dominant tenement, both by implication of law, and under the usual general words contained in the deed of partition.

When the Court is asked to interfere by injunction to restrain the obstruction of light and air to a dominant tenement, the question to be determined is—is the obstruction such as seriously to

interfere with the comfort or enjoyment of the owners of the dominant tenement, or such as to cause a material injury to it—an injury which cannot be completely compensated by damages.

English cases on the subject reviewed.

The Court will in such cases interfere, as well by mandatory as by preventive injunction, provided that in the circumstances of the case there is nothing inequitable in putting in force the former remedy.

The Court will look not merely to the use to which rooms, in a dwelling-house from which light is obstructed, are actually put at the time of the obstruction, but also to the use to which they may be put for all reasonable purposes of occupation.

It is immaterial whether light is admitted through a window or a door. In case of obstruction, the owner of the dominant tenement is in either case entitled to protection. *Ratanji H. Bottlewalla v. Edalji H. Bottlewalla* ...O.C.J. 181

#### MARRIAGE.—See STRI'DHAN.

#### MARRIED MAN, ADOPTION OF, AMONG SHU'DRA'S.—See ADOPTION BY WIDOW, 1.

#### MAXIMS—

DELEGATUS NON POTEST DELEGARE.  
CR. CA. 36

EXPRESSIO UNIUS, EXCLUSIO ALTERIUS.  
O.C.J. 35, 66

FACTUM VALET .....A.C.J. 69, 72

NOSCITURA SOCIIS .....A.C.J. 217

NULLUM TEMPUS OCCURRIT REGI.  
A.C.J. 172



- OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM .....A.C.J. 140
- PENDENTE LITE NIHIL INNOVETUR. A.C.J. 59
- QUOD LEX NON VETAT PERMITTIT. A.C.J. 69
- STARE DECISIS .....CR. CA. 59
- MEASURE OF DAMAGES.—See COMPENSATION TO FAMILY OF DECEASED.
- MESNE PROFITS.—See CIVIL PROCEDURE CODE, SEC. 7.
- MESNE PROFITS, SUIT FOR.—See SMALL CAUSE COURT, 2.
- MINORS' ACT (BOMBAY).—See ALIENATION BY NATURAL GUARDIAN.
- MISCHIEF.—See HIGH SEAS WITHIN THREE MILES FROM SHORE.
- MONEY PAID UNDER MISTAKE INDUCED BY FRAUD—

A, a *gumástá* of B's deceased husband, represented to B that he had her husband's will in his possession, containing a legacy in A's favour, and obtained from B an agreement for Rs. 2,000, expressed to be in consideration of the alleged will being given up to B, of A foregoing his legacy, and of services to be rendered by A in winding up the affairs of the shop. In pursuance of this agreement B paid a sum of money to A; but, upon discovering that the alleged will was not a will at all, sued to recover back the money so paid by her.

*Held* that, under the circumstances, the taking of the agreement was a fraud upon B; that the payment of the sum of money by B was not a voluntary payment, and could be recovered back; and that the

Court could not apportion the amount (if any) that might be claimable by B for work done under the agreement. *Rupíbi v. Parbhurám Kirpáshankar*. A.C.J. 102

## MORTGAGE—

As a general rule, by Hindú law a mortgagee in possession is entitled to have his claim satisfied in preference to the claim of the holder of a mortgage of prior date unaccompanied by possession.

There are cases, however, which the Courts treat as exceptions to that general rule.

Thus where a prior mortgagee sued to recover possession of certain mortgaged premises from the mortgagor, and before judgment was given in that suit a subsequent mortgagee filed another suit against the mortgagor and obtained judgment, under which possession was made over to him (the subsequent mortgagee); it was held that possession so obtained pending the earlier suit would not avail to give the subsequent mortgagee priority over the prior mortgagee.

The effect of a *lis pendens* in India considered. *Krishnáppá valad Mahádáppá v. Bahirú Yádavráo*. A.C.J. 55

See EQUITY OF REDEMPTION. LIMITATION, 1. POWER OF SALE.

MORTGAGE WITHOUT POSSESSION.—See PURCHASER OF LAND FOR VALUE.

MORTGAGE WITHOUT POSSESSION IN THE KONKAN—

A mortgage in the Konkan without possession is invalid as against a

subsequent mortgagee with possession, but the registration of such a mortgage cures any defect or imperfection arising from the non-completion of the transaction by delivery of possession; and a deed so registered is good against a non-registered mortgage though accompanied by possession. Previous cases reviewed. *Hari Rámchandra v. Mahád'ji Vishnu.* A.C.J. 50

**MORTGAGEE'S RIGHT TO SELL WITHOUT INTERVENTION OF COURT.**—See POWER OF SALE.

**MOTHER-IN-LAW.**—See ALIENATION BY NATURAL GUARDIAN.

**MUHAMMADAN LAW.**—See MAINTENANCE BY MUHAMMADAN HUSBAND.

**MUNICIPAL RULES**—

1. By virtue of the last part of the Schedule headed "Offences against other Laws," added to the Code of Criminal Procedure by Act VIII. of 1869, a Subordinate Magistrate, Second Class, can take cognisance of the offence of a breach of the municipal rules promulgated under Act XXVI. of 1850. *Reg. v. Dharmáyá valad Sangóppá*.....CR. CA. 12

2. Municipal Commissioners appointed under Act XXVI. of 1850 have not, by that Act, conferred upon them, nor are they entitled to assume, judicial powers with reference to breaches of Rules or Bye-laws made by them under that Act.

*Reg. v. Kálidás Keval* approved and followed.

The authority to try offenders against such Rules or Bye-laws is vested in the Magistrates of the country,

and Subordinate as well as other Magistrates have jurisdiction to try such offenders.

*Reg. v. Dharmáyá valad Sangóppá* approved.

Rules made under the above Act which purport to give the Managing Committee of such Municipal Commissioners power to try offenders against such Rules, or to levy fines upon them, are *ultra vires* and illegal.

Rules of the Municipalities of Balsád, Súrat, Malcolm Pet, and Ahmedábád referred to and commented on. How far a rule partially *ultra vires* and partially *intra vires* can be enforced, as to the latter portion, considered. *Reg. v. Yenku Búpuji et al.* .....CR. CA. 39

**NATIVE STATES, OFFENCE IN**—

A European British subject is liable to be tried in the High Court of Bombay for an offence against the Indian Penal Code committed in the territories of a Native Prince in alliance with Government upon charges framed under the Penal Code. *Reg. v. Chill.* CR. CA. 92

**NA'ZAR.**—See ATTACHMENT AGAINST PERSON OR GOODS.

**NOTICE.**—See ATTACHMENT OF DEBT. FOREIGN JUDGMENT.

**NOTICE BY PURCHASER THAT HE WILL NOT ACCEPT.**—See READINESS AND WILLINGNESS OF VENDOR TO DELIVER.

**OBSTRUCTION OF LIGHT AND AIR.**—See MANDATORY INJUNCTION.

**OFFENCE FOR WHICH THE POLICE CANNOT ARREST WITHOUT WARRANT.**— See COMPLAINT UPON OATH.

## OMISSION OF CLAIM FROM SUIT.

—See CIVIL PROCEDURE CODE, SEC. 7.

## OMISSION OF MORTGAGED LANDS FROM CLAIM—

The plaintiffs in 1863 sued the defendants for the plaintiffs' share in certain undivided family property, and did not include in their claim certain lands then in the possession of mortgagees, which lands had been mortgaged by one of the defendants as manager of the family. The defendants subsequently redeemed the mortgaged lands.

The plaintiffs then filed a suit to recover their share of the lands so redeemed.

*Held* that they were entitled to maintain such suit, as the mortgaged lands had not been available for an actual partition at the time of the former suit. *Bálkrishna Vithal et al. v. Hari Shankar et al.* A.C.J. 64

## OPIUM LAWS, OFFENCES AGAINST—

The offence of unlawfully being in possession of smuggled opium is an offence exclusively cognisable by a Magistrate of a District or of a division of a District, as representing the Zillá Magistrate referred to in Reg. XXI. of 1827, Sec. 7. No other Magistrate or Court has now jurisdiction to hold a preliminary inquiry into, or to try a person accused of, such an offence.

*Reg. v. Hirá Jivá* approved, and the Court's reply, No. 1231 of 19th August 1867, to the Khándesh Session Judge's reference

No. 702 of 1867, dissented from. *Reg. v. Lakhu valad Sarku.* CR. CA. 113

## OPPOSING CREDITOR.—See FINAL DISCHARGE.

## ORAL EVIDENCE TO PROVE A WRITTEN CONTRACT INADMISSIBLE.—See ADMISSION MADE IN A DEPOSITION.

## ORDER BY MAGISTRATE FOR REMOVAL OF BUILDING, &amp;c. FROM PUBLIC PLACE—

The concluding clause of Sec. 311 of the Code of Criminal Procedure, though it prevents the Civil Courts from entertaining a suit to restrain a Magistrate from carrying out an order made under Sec. 308, or a suit for damages against the Magistrate or any other person in carrying out such order in the manner provided by law, does not bar a person against whom such an order has been carried into effect from instituting a suit to prove that land declared by the Magistrate to be public is his private property. *Lálji Ukheilá et al. v. Jowbá Dowbú and the Collector and Magistrate of Khándesh.* A.C.J. 94

## ORDER IN PERSONAM.—See SEQUESTRATION, WRIT OF.

## ORDER TO COMPEL PROPERTY TO BE DELIVERED TO SEQUESTRATORS.—See SEQUESTRATION, WRIT OF.

## OUTER DOOR.—See ATTACHMENT AGAINST PERSON OR GOODS.

## OWNER LYING BY.—See PURCHASE BONA FIDE WITHOUT NOTICE.

## PARTIES.—See MAINTENANCE. PRACTICE.

**PARTITION SUIT.**—*See* OMISSION OF MORTGAGED LANDS FROM CLAIM.

**PAYMENT OF RENT.**—*See* LANDLORD AND TENANT.

**PAYMENT TO HEIR OF HINDU'.**  
—*See* LEGAL REPRESENTATIVE OF HINDU', 2.

**PERSONAL DISCHARGE**—

An insolvent, a holder of shares in a joint stock company, on the 21st of May 1866, obtained his personal discharge under Sec. 47 of the Indian Insolvent Debtors' Act, but his name still continued on the register of the company, the Official Assignee not having elected to take the shares. The company was subsequently (on the 13th of April 1867) ordered to be wound up.

*Held* that the insolvent's liability to pay calls on the shares still continued, notwithstanding his personal discharge. *Bábá Sáheb Dámáskár's case*.....O.C.J. 117

*See* FINAL DISCHARGE.

**PLAINTIFFS APPEARING BY DIFFERENT PLEADERS.**—*See* DECREE.

**PLEA OF PAYMENT.**—*See* BURDEN OF PROOF.

**PLEADER.**—*See* DECREE.

**PLEDGE OF SHARES CONTRACTED TO BE SOLD.**—*See* READINESS AND WILLINGNESS OF VENDOR TO DELIVER.

**POSSESSION.**—*See* MORTGAGE WITHOUT POSSESSION IN THE KONKAN.

**POSSESSION OBTAINED BY SUBSEQUENT MORTGAGEE PENDING SUIT BY PRIOR MORTGAGEE.**—*See* MORTGAGE.

**POWER OF SALE**—

*Semble* (per Melvill, J.) that a private sale effected by a mortgagee in the Mofussil without the intervention of a Court, in pursuance of a power of sale given to him under his instrument of mortgage, is invalid. *Keshavráv Krishna Joshi v. Bhavánji bin Bábáji.*

A.C.J. 142

**PRACTICE**—

After a decree has been made whereby a suit has been referred to the Commissioner's office to have accounts taken and property sold, the Court has still power (if it should be found necessary) to add, as fresh parties to the suit, persons who are interested in its subject-matter and are likely to be affected by its results. *Vakatchand Lakhmichand v. The Advocate General et al.*

O.C.J. 96

*See* SEQUESTRATION.

**PRELIMINARY INQUIRY.** — *See* EXTRADITION.

**PRESCRIPTION**—

1. Prior to the passing of the Indian Limitation Act, 1871, in order to give rise to an easement by prescription overimmoveable property in the island of Bombay, it was necessary for a plaintiff claiming such an easement to prove twenty years' uninterrupted user of it. *Narotam Bápu v. Ganpatráv Pándurang*.....O.C.J. 69

2. A prescriptive right to have a yearly payment made by Government to a private individual cannot be acquired by reason of a continued series of voluntary payments made to him by Government

extending over a period of more than thirty years.

Thus where Government paid a yearly sum of Rs. 32-4-6 to a *Chirdá Hakdár*, by whom no services in return were rendered, from the year 1818 to 1860, and then discontinued such payment to the heir of the last holder, it was held that such yearly payments gave the *hakdár* no prescriptive rights against Government. *The Collector of Súrat v. Dáji Jogi et al.* A.C.J. 166

3. Where a *kabulayátdár* collected Government revenue for more than thirty years, the *kabuliyat* being signed each year by his co-*kabuláyatdár* as well as by himself, it was held that by so doing he had not, under the circumstances, acquired a prescriptive right to collect the revenues to the exclusion of his co-*kabuláyatdár*. *Bápu Rám Parbhu v. Visúji Chando Saktanekar* .....A.C.J. 182

PRESUMPTION.—See DECREE.

PRIOR AGREEMENT.—See DECREE.

PRIOR SA'NKHAT.—See PURCHASER OF LAND FOR VALUE.

PRIORITY.—See MORTGAGE.

PRISONER AFFIRMED.—See CONFESSION.

PRISONER'S RIGHT TO INSTRUCT VAKI'L.—See PUBLIC PROSECUTOR.

PRIVACY.—See INVASION OF PRIVACY.

PRIVILEGE OF SPEECH—

Question as to the extent of the privilege of speech accorded to counsel and advocates considered. *Reg. v. Káshináth Dinkar et al.* CR. CA. 126

PRIVILEGED COMMUNICATION.

—See DEFAMATION.

PROCEEDINGS IN COMMISSIONER'S OFFICE. — See PRACTICE.

PROCEDURE.—See MAINTENANCE, 2.

PROCESS FOR ENFORCING JUDGMENT.—See EX PARTE JUDGMENT.

PROHIBITION TO USE LEVEL-CROSSING FOR GENERAL TRAFFIC.—See REG. XII OF 1827, SEC. 19.

PROMISSORY NOTE GIVEN IN PAYMENT OF LOSS ON WAGERING CONTRACT.—See WAGERING CONTRACT.

PROSECUTION OF A JUDGE OR PUBLIC SERVANT.—See SANCTION FOR PROSECUTION BY LOCAL GOVERNMENT.

PROSECUTION OF SUIT IN WRONG COURT.—See LIMITATION, 3.

PROSECUTOR, DUTY OF.—See PUBLIC PROSECUTOR.

PUBLIC FUNCTIONARIES, ACTS OF TRESPASS COMMITTED BY.—See INJUNCTION.

PUBLIC POLICY.—See MAINTENANCE, 1.

PUBLIC PROSECUTOR—

Appointment of the Magistrate, who in the first instance had tried and convicted the accused, to be Crown Prosecutor to conduct an inquiry subsequently directed in the same case, censured as being unprecedented and objectionable. A Public Prosecutor should be without a personal interest in the cases which he conducts.

Prisoners should be allowed to have free converse with their *vakils* out of the hearing of the police officers in charge of such prisoners.

It is undesirable that Magistrates whose decisions are under appeal, or who have been engaged in promoting the prosecution, or police officers concerned in a case, should sit on the bench beside, or converse privately in court with, the Judge who is engaged in trying the prisoners' appeal. If the appellate Judge wishes to ascertain any facts relating to the case from the Magistrate who convicted the accused, he should examine the Magistrate upon oath or solemn affirmation, in the same manner as an ordinary witness. *Reg. v. Káshinúth Dinkar et al.* CR. CA. 126

**PURCHASER AT EXECUTION-SALE.**—See LEGAL REPRESENTATIVE OF HINDU', 1.

**PURCHASER BONA FIDE WITHOUT NOTICE—**

In order that a purchaser of immovable property from a Hindú in the island of Bombay may be entitled, as against the beneficial owner of such property, to set up the defence of being a *boná fide* purchaser without notice, he must show that he has made all proper inquiries into the title, and as to the state of the family of his vendor, and of his vendor's predecessors in title for a period of twelve years at least before the date of his purchase.

Where a purchaser claims to hold land which he has purchased from a third person on the ground that the owner of such land has acqui-

esced in the sale, the purchaser must show clearly that the real owner was aware of the sale at the time it took place.

Where the owner of land was not aware of its being sold by his father to a third person, but, having heard of such sale, subsequently stood by and allowed the purchaser to build upon the land, it was held that the owner could not recover the land without compensating the purchaser for the building erected by him upon the land, and three months were allowed to the owner within which to pay such compensation. *Sávaklál Karsandás v. Orá Nizmuddín bin Abdul Karím* .....O.C.J. 77

**PURCHASER OF LAND FOR VALUE—**

The plaintiff in 1866 obtained a decree against one Ramzán Mohidín for payment of a debt by him personally, or in default entitling the plaintiff to recover the amount from the sale of certain immovable property situated in Gujarát, on which the debt had been secured under a *sánkhat*. On the attachment of the immovable property in execution of that decree, the defendant objected under Sec. 246 of the Civil Procedure Code, and alleged that he had purchased the property in 1865. The attachment having, accordingly, been raised, the plaintiff sued for a declaration of his right to sell the mortgaged property. Both the lower courts threw out the plaintiff's claim.

On special appeal, the decrees of the lower courts were reversed, and



the case remanded for the trial of the issue whether the defendant was a *bona-fide* purchaser for valuable consideration without notice of the plaintiff's *sankhat* or lien on the property in dispute at or before the time of his purchase. *Girdhar Ranchoddás v. Hakamchand Revachand* .....A.C.J. 75

**PURPOSES OF JUSTICE.**—See **REMOVAL OF CAUSE FROM SMALL CAUSE COURT.**

**READINESS AND WILLINGNESS TO DELIVER—**

A contract for the delivery of shares at a future day is a contract that can be assigned in Equity, and the assignee of such a contract can, in his own name, maintain a suit to recover damages for its breach in the Civil Courts in India.

In such a suit the plaintiff would be subject to any equities that might subsist between his assignor and the defendant.

In order to support an allegation of readiness and willingness to deliver, an actual tender is not in all cases necessary : *e. g.*, a tender will be dispensed with where the defendant has refused to perform the contract, or where on the day for the performance of it he has absconded, and, having closed his place of business, has left no agent or other person to represent him. *Dayábhái Dipchand v. Dullabhrám Dayáram*.....A.C.J. 133

**READINESS AND WILLINGNESS OF VENDOR TO DELIVER—**

Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day,

gives notice to the vendor that he (the purchaser) will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares.

*Semble.* The mere fact that such shares are pledged to a third person is not sufficient to show that the vendor is not ready and willing to deliver them, if there is nothing to show that the pledgee is not willing to assist the vendor in carrying out his contract, and it being apparently for the advantage of the pledgee that he should do so. *Dayábhái Dipchand v. Mániklál Vrijbhukan* .....A.C.J. 123

**RECOGNISED AGENT.**—See **SERVICE OF SUMMONS.**

**REGISTRATION.**—See **ADMISSION MADE IN A DEPOSITION. MORTGAGE WITHOUT POSSESSION IN THE KONKAN.**

**REGULATIONS (BENGAL)—**

No. XI. OF 1803 .....O.C.J. 108

No. VIII. OF 1819, SECS. 3 AND 18.  
A.C.J. 225

**REGULATIONS (BOMBAY)—**

No. II. OF 1827, SEC. 43. — See **JURISDICTION.**

SECS. 52 & 53. .... A.C.J. 101

No. IV. OF 1827, SEC. 25. A.C.J. 90, 91

No. V. OF 1827—

SEC. 1.—See **PRESCRIPTION, 2.**

SECS. 3 & 4.—See **LIMITATION, 2.**

SEC. 15 .....A.C.J. 145

No. VIII. OF 1827.—See **LEGAL REPRESENTATIVE OF HINDU', 2.**

O.C.J. 158

No. XII. OF 1827. CR. CA. 84, 119,  
120, 121, 122

A notice prohibiting general traffic over certain level-crossings on a railway provided for particular villages, forbidden, as not falling within the scope of Reg. XII. of 1827, Sec. XIX., cl. 1 and 6. *In the matter of a Prohibitory Notice under Reg. XII. of 1827, Sec. XIX., cl. 6* .....CR. CA. 23

No. XIII. OF 1827. CR. CA. 119, 122

No. XIV. OF 1827 .....CR. CA. 121

No. XVI. OF 1827, SEC. 20.—*See MAJMUDA'RI WATAN.*

No. XVII. OF 1827. A.C.J. 13, 14, 186, 190, 191, 192, 220, 221, 225; CR. CA. 48

SEC. 16. — *See ALTERNATIVE CHARGE.*

SEC. 31 .....A.C.J. 176

No. XXI. OF 1827—

SEC. 4.—*See OPIUM LAWS, OFFENCES AGAINST.*

SEC. 7.—*See OPIUM LAWS, OFFENCES AGAINST.*.....CR. CA. 60

SEC. 10.—*See OPIUM LAWS, OFFENCES AGAINST.*

No. XXIX. OF 1827, SECS. 3 AND 5. A.C.J. 25

No. I. OF 1830, SEC. 3, AND SEC. V., CL. 2.—*See JURISDICTION.*

No. III. OF 1830.....CR. CA. 119, 120

No. IV. OF 1830. CR. CA. 119, 120, 122

No. VI. OF 1830 .....A.C.J. 190

REGULATION OF MOFUSSIL COURTS.—*See SERVICE LANDS.*

RELATION BACK.—*See ADMINISTRATOR OF THE ESTATE OF A DECEASED HINDU. ADOPTION BY WIDOW.*

REMOVAL OF CAUSE FROM SMALL CAUSE COURT—

The Bombay Court of Small Causes is subject to the superintendence of the High Court within the meaning of Cl. 13 of the Letters Patent of the High Court, and the latter has, therefore, power, for purposes of justice, to remove a case from the Small Cause Court, and itself to try and determine such case.

The inability of the Small Cause Court to issue a commission to examine for the defence witnesses residing outside its jurisdiction, though not in general, may under peculiar circumstances be a good ground for granting an order to remove a case from the Small Cause Court into the High Court.

Terms upon which such order will be granted. *Pirbhái Khimji v. The Bombay, Baroda, and Central India Railway Company* ...O.C.J. 59

REPAIRS.—*See EQUITY OF REDEMPTION.*

REPORT OF POLICE OFFICER.—*See COMPLAINT UPON OATH.*

REPORT OF SUBORDINATE MAGISTRATE. — *See CREDIBLE INFORMATION.*

REPUDIATION OF CONTRACT.—*See CONTRACT.*

RES JUDICATA.—*See CAUSE OF ACTION HEARD AND DETERMINED.*

RESIDENCE. — *See SEQUESTRATION, WRIT OF.*

RESUMPTION OF GRANT.—*See GRANT BY GOVERNMENT.*

RESUMPTION OF SERVICE LANDS.—*See SERVICE LANDS.*

REVENUE SURVEY—

Sec. 36 of Bombay Act I. of 1865 applies only to lands to which a



revenue survey has been extended under that Act.

Prior to the passing of the above Act, by usage having the force of law, Government was unable to eject an ordinary tenant of land so long as the latter was willing to pay the reasonable assessment upon the land occupied by him.

This usage might be limited or varied by special contract, *e.g.*, by the terms of a lease inconsistent with it. *Duliá Kásám v. Abrúmji Sále.*  
A.C.J. 11

See BOUNDARY DISPUTE.

#### REVIEW—

After the expiration of the period allowed by law for making an application for a review, the Court has no jurisdiction to entertain it without just and reasonable ground to the satisfaction of the Court being assigned for the delay. Preferring an appeal is not a just and reasonable cause for not preferring an application for review.

Where the Court granted a review without any cause having been assigned for the delay, and varied its former decree, the High Court, reversing all that was done under the review, restored the former decree. *Fakirá v. Basáppá Máhádan Shetti*.....A.C.J. 234

#### RIGHT OF FATHER TO WILL AWAY SELF-ACQUIRED PROPERTY FROM ADOPTED SON.

—See ADOPTION.

#### RIGHT OF TENANT TO HOLD LAND UPON PAYMENT OF REASONABLE ASSESSMENT.

—See REVENUE SURVEY.

#### SALE FOR FUTURE DELIVERY.

—See READINESS AND WILLINGNESS OF VENDOR TO DELIVER.

#### SALE OF LAND BY NON-JUDICIAL ORDER OF COLLECTOR—

The “order” of a Collector or other officer of revenue, as the word is used in the latter portion of cl. 3 of Sec. 1. of Act XIV. of 1859, means an order of the nature of a decree, or made by the Collector or other revenue officer in his judicial capacity.

Where a piece of land, embraced within the operations of the Revenue Survey, and subjected to a defined assessment, was put up for sale by the Collector in consequence of the occupant refusing to pay a fine to be allowed to continue in occupation of it, and was purchased by one of the defendants, and the occupant, asserting that he had been wrongly dispossessed, sued to set aside the sale, and to be declared entitled to recover the land and retain possession of it, on condition of paying the assessment as settled upon it by the revenue officers, but delayed bringing his suit until June 1869, the sale having taken place in January 1867 :

*It was held that, though more than one year had elapsed from the date of the sale, the suit was not barred under the provisions of cl. 3 of Sec. 1. of Act XIV. of 1859. Sakhárám Vithal A'dhikári v. The Collector of Ratnágiri et al.* A.C.J. 219

#### SANCTION FOR PROSECUTION BY LOCAL GOVERNMENT—

The Local Government in sanctioning or directing (under Sec. 167 of

the Criminal Procedure Code) a charge against a public servant of an offence as such public servant has power to limit its sanction, by giving directions as to the person by whom, and the manner in which, the prosecution is to be preferred and conducted; and a court has no jurisdiction to entertain a charge against such public servant if preferred otherwise than in accordance with such directions.

*Semble.* The Local Government has power in the like case to direct that the accused public servant shall be tried before a specified tribunal, being one having jurisdiction in that behalf.

Therefore, where the sanction directed that the accused public servant should be prosecuted upon such charges as Mr. C. might be prepared to prefer against him, and there was nothing on the record to show, nor did it otherwise appear, that Mr. C. had preferred any charge against, or taken any part in the prosecution of, the accused public servant, the High Court quashed the conviction of the accused, as having been without jurisdiction. *Reg. v. Vinayak Divakar*.....CR. CA. 32

#### SANCTION FOR PROSECUTION—

Sanction for the prosecution of the accused was accorded by an Assistant Session Judge in the following terms:—

“There is no doubt whatever that Tái, Báji, and Bálá, these three persons, made before me certain statements contradictory of the

statements which they had made before the committing Magistrate. Therefore, if from such statements of theirs they may be liable to any charge, there is sanction from here” (*i.e.*, I give my sanction) “for their prosecution.”

*Held* that this gave sufficient sanction for the prosecution of the accused under Sec. 193 of the Indian Penal Code, and that it is not necessary that the authority giving the sanction should specify the particular section of the Penal Code under which the accused is permitted to be prosecuted. *Reg. v. Tái*.....CR. CA. 2

#### SANCTION FOR PROSECUTION PENDING INQUIRY.—*See* CONFESSION.

#### SANCTION TO PROSECUTE—

Where a Civil Court, by letter to a Subordinate Magistrate with committing powers, gave sanction for the prosecution of the accused under Secs. 463 and 471 of the Indian Penal Code (making and using a false document), and where the Magistrate, in committing the accused for trial, in addition to framing a charge under these sections, added a head of charge under Sec. 193 (giving false evidence):

*It was held* that the Magistrate had no jurisdiction to commit the accused for trial on the last-mentioned head of charge. *Reg. v. Subi Sáni*.....CR. CA. 28

#### SARDA'R FOR RANK AND PRECEDENCE ONLY—

Where a person's name was entered in red ink in the Dakhan Sardárs'

list, indicating that he was entitled only to the rank and precedence of a Third Class Sardár :

It was held that a Subordinate Judge had jurisdiction to inquire into an application for execution of a decree passed against his ancestor by the Agent for Sardárs in the Dakhan. *Mahárájgir v. Anandráv and Yádaráv*. .....A.C.J. 25

#### SECURITY TO KEEP THE PEACE.

—See CREDIBLE INFORMATION.

#### SELF-ACQUIRED PROPERTY.—

See ADOPTION.

#### SEQUESTRATION—

The process of sequestration for contempt of a decree or order of court, as it existed in the late Supreme Court, will, in a proper case, issue out of the High Court.

The object of Rule 389 of the Supreme Court Rules, which required a party who wished to enforce an order by sequestration to indorse upon the copy of the order served upon his opponent a memorandum to the effect that in default of performance of the order he would be liable to be arrested, and to have his estate sequestered, was to enable the party making such indorsement to apply *ex parte* for the writ. In the absence of such a memorandum indorsed upon the copy-order, a party desirous of enforcing an order by sequestration must give proper notice to his opponent of his intention to apply for the writ.

An order commanding an act to be done "forthwith" is sufficiently in conformity with the rule that requires the time within which an

act ordered to be done is to be performed to be specified in the order. *Harivallabhdás Kallíándás v. Utamchand Mánikchand*.

O.C.J. 135

#### SEQUESTRATION, WRIT OF—

An inhabitant of Barodá who carries on the business of a banker at Bombay by a *munim*, and has a place of business there, is constructively an inhabitant of Bombay, and as such is subject to the orders and process of the High Court in the exercise of its Equity jurisdiction, as provided by Sec. 41 of the Charter of the late Supreme Court, and continued to the High Court by the Act under which it was established.

A person appearing to discharge a rule thereby waives all objections to the formality of the service of the rule upon him.

The High Court will assert its jurisdiction for the purpose of preventing a writ of sequestration issued by it from becoming a mere form, and under proper circumstances will operate *in personam* where the property sought to be sequestered is outside its jurisdiction. *Harivallabhdás Kallíándás v. Utamchand Mánikchand*. .....O.C.J. 236

SERVICE.—See SEQUESTRATION, WRIT OF.

#### SERVICE LANDS—

Cl. 4 of Sec. II. of Bombay Act VII. of 1863 (an Act for the summary settlement of claims to exemption from the payment of Government land revenue) enacts that no suit or action between Government and the holders of \* \* \* any lands

held for service in regard to the tenure of such lands shall be entertained in any Court of Civil Judicature. *Held* that the phrase lands "held for service" meant lands declared by Government under Sec. 32 (a) of the Act to be so held, though the plaintiff may deny that the lands in respect of which he sues are service lands.

The laying down of general rules by Government as to the resumption of service lands, under Art. 3, cl. 3, of Sec. II. of the Act, is not a condition precedent to their protection from suits and actions in respect of such lands.

The Governor of Bombay in Council has power to pass Acts limiting or regulating the jurisdiction of the Courts in the Mofussil established by the local Legislature, and such Acts are not void because their indirect effect may be to increase or diminish the occasions for the exercise of the appellate jurisdiction of the High Court.

The policy of Government as shown in its course of legislation of recent years with reference to judicial institutions, as compared with its policy at the time when the Elphinstone Code was passed, reviewed. *Premshankar Raghunáthji v. The Government of Bombay*. .....A.C.J. 195

#### SERVICE OF SUMMONS—

Messrs. R., S., & Co., European merchants carrying on business in Bombay, received a letter from the owner of the ship "Rialto" by which Messrs. R., S., & Co. were

constituted agents to obtain freight for the "Rialto" on a voyage from Bombay to Liverpool, the ship being placed in their hands for that purpose. Acting on this letter, Messrs. R., S., & Co. obtained freight for the "Rialto," signing the shipping orders in their own name as Agents for the Master of the "Rialto." Messrs. R., S., & Co. held no other authority from the owner of the "Rialto" than that contained in the above letter.

*Held* that Messrs. R., S., & Co. did not carry on business for and *in the name of* the owner of the "Rialto," and were not, therefore, his recognised agents within the meaning of Sec. XVII., cl. 2, of the Code of Civil Procedure, to accept service of a summons on his behalf in respect of a cause of action that arose out of the "Rialto."

Whether, in order to constitute a recognised agent within the meaning of the above section, the business carried on by him must be continuous, and not an occasional or desultory business—*Quære*.

*Semble*. A Bombay firm simply employed by the owners of a ship visiting Bombay to procure freight for her for a particular voyage cannot, under ordinary circumstances, be regarded as carrying on business in the name of the owners of such ship. *Ratansi Pancham v. Charles Saunders*.

O.C.J. 159

SETTING ASIDE EX-PARTE JUDGMENT.—*See* EX-PARTE JUDGMENT.

SETTING BACK HOUSES.—*See* INJUNCTION.

**SHARES, CONTRACT FOR DELIVERY OF.**—See **READINESS AND WILLINGNESS TO DELIVER.**

**SHERIFF.**—See **ATTACHMENT AGAINST PERSON OR GOODS.**

**SHARES.**—See **READINESS AND WILLINGNESS OF VENDOR TO DELIVER.**

**SHIP'S AGENTS.**—See **SERVICE OF SUMMONS.**

### **SMALL CAUSE COURT—**

1. A suit to recover the price of the skin and flesh of an ox, brought by a Máhár who asserted an hereditary right to carry away dead animals of the village to which he belonged, and take their skins, is a suit for damages, and cognisable by a Court of Small Causes.

Although a question of title be incidentally gone into in such a suit, no special appeal lies, under Sec. 27 of Act XXIII. of 1861.

A decree passed in a suit of this nature is not a bar to a suit for a general declaration of title. *Khandu valad Keru et al. v. Tútíá valad Viṭhobá*.....A.C.J. 23

2. A suit for the recovery of mesne profits (not amounting to Rs. 500) is cognisable by a Court of Small Causes.

A special appeal does not lie in such a suit. *Kákáji Sakhárám v. Govind Ganesh et al.* .....A.C.J. 96

See **REMOVAL OF CAUSE FROM SMALL CAUSE COURT.**

**SMUGGLED OPIUM, POSSESSION OF.**—See **OPIUM LAWS, OFFENCES AGAINST.**

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### **SPECIFICATION OF SECTION.—**

See **SANCTION FOR PROSECUTION.**

### **SPLITTING CAUSE OF ACTION.—**

See **CIVIL PROCEDURE CODE, SEC. 7.**

### **STAMP—**

The illegal seizure and detention of cattle, to which Sec. 14 of Act III. of 1857 refers, is not an "offence" within the meaning of Sec. 31 and Sch. II. No. 1, cl. (b), of the Court Fees' Act, VII. of 1870. Complaints of such illegal seizure and detention do not require a stamp.

If such complaints be stamped, it is not competent for the Court to direct that the accused shall repay the amount of such stamp to the complainant. *Reg. v. Arji bin Náru et al.* .....CR. CA. 22

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STOLEN BOND.— See BURDEN OF  
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### STRI'DHAN—

Where a mother, in pursuance of the promise of her deceased husband, allowed her son to be adopted, but did not herself attend at the adoption ceremonies to give her son in adoption, but commissioned her uncle to give the boy on her behalf, it was held that the adoption was not on that account invalid.

Amongst Hindús of the Bhandári and other inferior castes the *A'sura* form of marriage (probably derived from a form in use amongst the inhabitants of Hindustán before the introduction of the Brahmanical religion) is more customary than the four approved forms of marriage.

The principal characteristic of the *A'sura* form is the giving by the bridegroom of *Dez*, or a money payment, to the father of the bride.

The etymological import of the word *Stridhan*, and the different views with which it is regarded in the Eastern and Western schools of Hindú Law, pointed out.

The Mitákshará recognises only one class of *stridhan*, and includes in that class *all* property acquired by a woman by inheritance. According to the last-mentioned authority, a woman's *stridhan*, if she has been married by the *A'sura* form, upon her death childless, goes to her mother, her father, and their kindred—(*i. e.*) to the *sapindás* of her father in the first instance, and failing them, to her



mother's next of kin; but if a woman has been married according to one of the approved forms, her *strīdhan* descends, upon her death childless, to her husband and his *sapindās*.

Over *strīdhan* acquired by inheritance (so far as it consists of immoveable property) a woman's power of alienation is limited.

The Vyavahāra Mayūkha also considers property acquired by a woman by inheritance to be *strīdhan*, but classes *strīdhan* under two heads—*strīdhan* in a narrower sense, embracing particular species, for which a peculiar mode of devolution is prescribed, and *strīdhan* generally (including *strīdhan* acquired by inheritance), which descends in the same line as if the woman had been a male, i. e., to her sons and the rest, and this notwithstanding her having left daughters.

Authorities bearing upon the subject of *strīdhan* considered and commented upon. *Vijārangam et al. v. Lakshuman et al.* O.C.J. 244

See THEFT OF PALLA'.

STRIDHAN WHEN LIABLE TO SEIZURE, WHEN NOT.—See EXECUTION AGAINST HUSBAND.

SUBORDINATE MAGISTRATE.—See MUNICIPAL RULES, 1, 2.

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THEFT OF BOND BY OBLIGEES.—See BURDEN OF PROOF.

THEFT OF PALLA'—

A Hindú woman who removes from the possession of her husband, and without his consent, her *pallá* or *strīdhan*, cannot be convicted of theft, nor can any person who joins her in removing it be convicted of that offence. *Reg. v. Nuthá Kalyán and Bái Lakhi*

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**TITLE.**—*See* PURCHASER BONA FIDE WITHOUT NOTICE. SMALL CAUSE COURT, 1.

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**VAKI'L'S RIGHT TO APPEAR FOR COMPLAINANT—**

At an inquiry held by a Magistrate, under Sec. 180 of the Criminal Procedure Code, for the purpose of ascertaining the truth or falsehood of a complaint, the complainant has no right to be represented by a *vakíl*, who, therefore, cannot sue the Magistrate for damages for not allowing him to appear for the complainant upon such an inquiry.

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**WAGERING CONTRACT—**

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